93-517

No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT,

Petitioner,

v.

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

NATHAN LEWIN
(Counsel of Record)
LISA D. BURGET
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

126 pp

QUESTIONS PRESENTED

1. Whether a statute that creates a public school district in order to educate disabled children, with boundaries that are coterminous with a lawfully incorporated municipality whose residents all share a common religious faith, is unconstitutional on its face, regardless of how it is administered, on the ground that such statute has the "primary effect" of advancing religion within the meaning of *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

2. Whether *Lemon* and the "primary effect" test should be overruled and replaced with a standard that permits a State to enact legislation addressing the secular needs of a community sharing a common religious faith.

LIST OF PARTIES

The Board of Education of the Monroe-Woodbury Central School District was an appellant below and is filing a separate petition for a writ of certiorari.

The Attorney General of the State of New York appeared below in support of appellants and the constitutionality of Chapter 748 of the Laws of 1989 pursuant to New York Executive Law § 71. The Attorney General is also filing a separate petition for a writ of certiorari.

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v.

LOUIS GRUMET and ALBERT W. HAWK,

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

The petitioner Board of Education of the Kiryas Joel Village School District respectfully requests that a writ of certiorari issue to review the judgment and opinion of the New York Court of Appeals, entered in the above-entitled proceeding on July 6, 1993.

OPINIONS BELOW

The majority, concurring and dissenting opinions of the New York Court of Appeals (Appendix A, pp. 1a-60a, *infra*) are reported at 81 N.Y.2d 518, 601 N.Y.S.2d 61, 618

N.E.2d 94. The majority and dissenting opinions of the Appellate Division, Third Department (Appendix B, pp. 61a-91a, *infra*) are reported at 187 A.D.2d 16, 592 N.Y.S.2d 123. The opinion of the Supreme Court, Albany County (Appendix C, pp. 92a-101a, *infra*) is reported at 151 Misc.2d 60, 579 N.Y.S.2d 1004.

JURISDICTION

The judgment of the New York Court of Appeals was entered on July 6, 1993. On July 26, 1993, this Court stayed the decision of the New York Court of Appeals pending the filing and disposition of a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

2. Chapter 748 of the Laws of 1989 (entitled "AN ACT to establish a separate school district in and for the village of Kiryas Joel, Orange county") provides:

Section 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and

duties of a union free school district under the provisions of the education law.

§ 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

§ 3. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law.

STATEMENT

1. The Village of Kiryas Joel

The Village of Kiryas Joel is located in Orange County, New York. The residents of the village are Satmar Hasidic Jews -- devoutly religious people who believe in maintaining an insular community where religious ritual is scrupulously followed, where Yiddish, rather than English, is frequently spoken, where distinctive dress and appearance are the norm, where television is excluded, and where -- in general -- children receive their education in private boys' and girls' religious schools rather than in secular public schools.

The land making up the village is owned by private individuals, and not by any religious institution or entity. The village's inhabitants have voluntarily chosen to live in geographic proximity to each other so as to facilitate the exercise of their shared religious beliefs and preserve their unique culture and way of life. No one is excluded from the village on the grounds of race or religion. Thus far,

however, only members of the Satmar community have chosen to live in Kiryas Joel.

The village has operated as a lawful municipality since March 1977, when it was carved out of the Town of Monroe and issued a Certificate of Incorporation by the State of New York pursuant to Article 2 of New York's Village Law.

2. The Dispute Over the Education of Disabled Children Living in Kiryas Joel

Before passage of Chapter 748 in 1989, the Village of Kiryas Joel was under the jurisdiction of the Monroe-Woodbury Central School District ("Monroe-Woodbury"). The non-disabled children of the village all attended private religious schools in Kiryas Joel. Federal and state law required, however, that Monroe-Woodbury provide a "free appropriate public education" to all children within its jurisdiction needing special education services (20 U.S.C. §§ 1400(c), 1401(a)(18), 1412; New York Education Law § 4401 *et seq.*; 8 NYCRR § 200 *et seq.*).

Prior to this Court's 5-4 decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), the disabled children of Kiryas Joel received education services from Monroe-Woodbury public-school personnel in an annex to one of the religious schools. That program was terminated because of the *Aguilar* decision, and some Satmar parents initially enrolled their disabled children in classes in the Monroe-Woodbury public schools. The Kiryas Joel parents found, however, that the

children were traumatized by their experiences in attending the Monroe-Woodbury schools outside the village. [1]

Monroe-Woodbury refused to provide services for the disabled Satmar children at any site other than the regular public schools located outside Kiryas Joel. In 1985, Monroe-Woodbury initiated a lawsuit in state court requesting a declaratory judgment that it lacked statutory authority to provide such services elsewhere. The Satmar parents counterclaimed, arguing that Monroe-Woodbury had to provide the services at a "neutral site" in the village. The New York Court of Appeals ultimately ruled that neither side was correct, but, citing this Court's decision in *Wolman v. Walter*, 433 U.S. 229 (1977), observed that "[i]t may well be that certain of the services in controversy could be furnished to [the Satmar children] at neutral sites if [Monroe-Woodbury] determined to do so." *Board of Education of the Monroe-Woodbury Central School District v. Wieder*, 72 N.Y.2d 174, 189 n.3, 531 N.Y.S.2d 889, 897 n.3 (1988).

3. The Enactment of Chapter 748

Monroe-Woodbury continued to refuse to provide the required special education services at a location within the

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[1] Although the questions presented by this petition do not depend on the details of the Satmar Hasidic credo, we disagree with the proposition that there is a religious tenet prescribing separatism. *Compare* pp. 14a, 15a, *infra* ("separatist tenets"). The Satmar community lives together in order to facilitate individual religious observance and maintain social and religious values. But, unlike, for example, separation of schoolchildren by gender (which is followed strictly in the religious schools, but not in the Kiryas Joel public school), separatism is *not* a religiously mandated practice.

village. The New York Legislature then passed Chapter 748 of the Laws of 1989, declaring that the Village of Kiryas Joel "shall be and hereby is constituted a separate school district . . . and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law." The legislation was supported by a unanimous vote of the Monroe-Woodbury Board of Education, which sent a letter to Governor Cuomo urging him to sign the bill because "it will allow for the proper education of the Kiryas Joel handicapped children" and "will serve to reduce community tension and lead to productive relationships." 3 R. 689-90. [2/]

On July 24, 1989, the Governor approved Chapter 748, stating that he had been advised by his counsel that it is facially constitutional. He warned that "this new school district must take pains to avoid conduct that violates the separation of church and state because then a constitutional problem would arise in the application of this law." 1 R. 111.

A seven-member board of education was elected. On July 1, 1990, as provided in the statute, the Kiryas Joel Village School District officially became operational. Since that time, the district has been an unqualified success. Indeed, no challenge has been made to Chapter 748 as applied.

The district's one school is currently providing totally secular special education services to approximately 200 disabled children who would otherwise have no schooling whatever. The district's Superintendent is not Hasidic. He

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[2/] "__ R. __" represents the printed record filed in the New York Court of Appeals.

served for twenty years in the New York City public school system, where he gained expertise in the highly specialized area of bilingual-bicultural special education. The teachers and therapists, all of whom live outside the village, teach a secular curriculum of subjects such as reading, writing, arithmetic, music and physical education to mixed classes of boys and girls. This secular education is totally different from the religious indoctrination provided in the gender-segregated private religious schools located in Kiryas Joel.

4. The Constitutional Challenge

Respondents brought this action in January 1990, challenging Chapter 748 as facially invalid under the Establishment Clause of the United States Constitution and Article XI, § 3, of the New York State Constitution. There was no discovery or other factual inquiry. On cross-motions for summary judgment, the Supreme Court, Albany County, held that Chapter 748 violated all three prongs of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and was therefore facially unconstitutional under both the federal and state constitutions (p. 92a, *infra*).

5. The Divided Appellate Division Decision

The Appellate Division, Third Department, affirmed that decision over a dissent by Justice Levine, [3/] on the ground that Chapter 748 had the primary effect of advancing religion and therefore violated both the federal and state constitutions (p. 61a, *infra*). The Appellate Division majority reasoned that because "religion played a role in the

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[3/] On August 12, 1993, Justice Levine was nominated by the Governor to the New York Court of Appeals. He was confirmed on September 7, 1993.

dispute" between the Kiryas Joel parents and Monroe-Woodbury (p. 71a, *infra*), the creation of a school district coterminous with the Village of Kiryas Joel to resolve that dispute created a "symbolic union between church and state" that "is significantly likely to be perceived by adherents of the Satmarer Hasidim as an endorsement, and by nonadherents as a disapproval, of their individual religious beliefs" (p. 70a, *infra*).

Justice Levine's dissent concluded that Chapter 748 on its face passes all three prongs of the *Lemon* test. Justice Levine found that the reason given by the Satmar parents for not using the Monroe-Woodbury facilities was secular, not religious (pp. 77a-78a, *infra*). He also concluded that, even assuming the Satmar parents had declined to send their children to school outside of the village for religious reasons, the State's accommodation of their religious beliefs did not have the primary effect of advancing religion (pp. 84a-88a, *infra*).

6. The Divided Court of Appeals Decision

The New York Court of Appeals, by a 4-to-2 vote, affirmed the Appellate Division's conclusion that Chapter 748 violates *Lemon*'s "primary effect" prong. The court modified the Appellate Division decision, however, to the extent that it relied on the New York State Constitution in striking down Chapter 748 (pp. 16a-17a, *infra*). By explicitly disclaiming any reliance on the New York Constitution, the Court of Appeals left only a clearly framed federal constitutional question for this Court to consider.

The majority reasoned that Chapter 748 has the primary effect of advancing religion because "the statute not only authorizes a religious community to dictate where

secular public educational services shall be provided to the children of the community, but also 'creates the type of symbolic impact that is impermissible under the second prong of the *Lemon* test'" (p. 12a, *infra* (quoting 187 A.D.2d at 22, 592 N.Y.S.2d at 127)). The majority relied on its conclusion that "only Hasidic children will attend the public schools in the newly established school district, and only members of the Hasidic sect will likely serve on the school board" (p. 12a, *infra*).

The dissent by Judge Bellacosa found that any "incidental, 'attenuated' benefit to the minority Satmar viewpoint supports this State's rich pluralistic tradition and does not diminish, but rather enhances, the common good" (p. 51a, *infra*). Judge Bellacosa reasoned that "the establishment of a union free school district geographically identical to an incorporated municipality, in the context of the constitutional and statutory guarantees of public education, neutral religious rights and nondiscrimination provided by both Federal and State law, should not be stigmatized as aid to a particular denomination, simply because the inhabitants of that municipality are predominantly or even exclusively members of that denomination" (p. 56a, *infra*).

7. This Court's Stay of the Decision Below

On July 26, 1993, this Court issued an Order staying the judgment of the Court of Appeals pending the timely filing and disposition by this Court of a petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Misunderstands the "Primary Effect" Prong of *Lemon v. Kurtzman*.

As a result of the challenged New York statute, approximately 200 disabled children receive a wholly secular education from an ethnically and religiously heterogeneous faculty in a building that has no religious symbols or significance. There is not a scintilla of evidence that Chapter 748 has been used in any way to inculcate religious doctrine or to convey religious teaching. Indeed, there is no factual record whatever since the respondents' constitutional challenge was to the facial validity of Chapter 748.

(a) ***The rationale of the court below*** — The majority of the court below found Chapter 748 unconstitutional because it determined that the creation of this particular school district "is sufficiently likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval, of their individual religious choices" (p. 12a, *infra*). In the majority's view, the mere *enactment* of the law created the kind of "symbolic union of church and state" that was found to be constitutionally impermissible in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985).

(b) ***Misapplication of this Court's decisions*** — This was a gross distortion of the "primary effect" prong and of the "symbolic union of church and state" interpretation given to that prong in this Court's *Grand Rapids* decision. This Court held in *Grand Rapids* that the "symbolic union" of day-in-day-out instruction by public-school personnel on the premises of a pervasively sectarian parochial school

would give "children of tender years" the impression of "a union between church and state." 473 U.S. at 390.

That continuing "symbolic union" is totally different from the transitory inference of cooperation between church and state on which the majority below relied. Nor is the perception conveyed to adult Satmar Hasidim or to adult "nonadherents" the same as the daily impression of schoolchildren who see, before their eyes, a "symbolic union" in the merged program invalidated in *Grand Rapids*. The fact that the New York Legislature created a public school district to correct a harmful condition affecting a community of religious believers could be viewed as a "symbolic" representation of public policy only during the period when the legislation is new and when its opponents, such as the respondents in this case, keep it in the forefront of public attention. Once the controversy is over, all that remains is a secular public school located in Kiryas Joel, offering a secular education to disabled children. And, unlike *Grand Rapids v. Ball*, the children who attend the public school in Kiryas Joel see only a public school providing a secular education, not "a symbolic union of church and state." The long-range consequence of the challenged law, rather than an erroneous temporary impression created by a dispute over its enactment, governs the "primary effect" prong of *Lemon v. Kurtzman*. [4/]

[4/] A statute through which a State addresses its citizens' secular needs does not have the "primary effect" of advancing religion merely because those needs bear some relation to the citizens' religion. If a Hasidic family is poor because its members are unavailable to work on religious holidays or because of religious discrimination, the family's poverty is not a "religious" condition and alleviating it is not an endorsement of religion. Likewise, Chapter 748 does not endorse Satmar religion merely because the secular need it met (the children's need to be educated within the village) would not have existed but for the religion of their parents.

(c) ***Composition of the school board*** — The fact that the school board may reflect the religious and ethnic characteristics of the voters of the village is surely not an *ipso facto* violation of the Establishment Clause. If it were, other legislative districts where Catholics, Mormons, or Jews predominate would be constitutionally suspect. Under the Equal Protection Clause, the same might be true of districts where white citizens reside in overwhelming numbers. The fact that elected representatives of a district will, by and large, mirror their constituencies is not a reason to invalidate the district. By the same token, the fact that Kiryas Joel's residents will elect Satmar Hasidim to public office does not turn their official acts into governmental endorsement of religion.

(d) ***Accommodation to religious needs*** — Chapter 748 has, at most, the effect of accommodating the needs of a community of devoutly religious people. The statute does no more than ameliorate a burden that results from the free exercise of religion. Without Chapter 748, a community that has chosen to live together to preserve its religious heritage and practices will be unable to educate its disabled children to live in the modern world. This Court has repeatedly approved of accommodations to religious observance as consistent with the Establishment Clause. *See Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 144-45 (1987) ("The government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause."); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("[The Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions . . ."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (accommodation by the government of the religious beliefs of its citizens "follows the best of our traditions"). The New York Court of Appeals ignored this principle in

holding that "the legislature may not treat the Satmarer community as separate, distinct and entitled to special accommodation" (p. 16a, *infra*). Indeed, this Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), upheld the *right* of the Amish religious sect to be exempted from certain compulsory school-attendance laws under the Free Exercise Clause based on religious convictions and resistance to the values of modern society that parallel those of the Satmar community.

The residents of Kiryas Joel do not claim that they have the right to their own school district under the Free Exercise Clause, but merely that the New York Legislature did not violate the Establishment Clause when it chose to create such a district. Chapter 748 is precisely the type of legislation this Court had in mind in *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), when it advocated "leaving accommodation to the political process." The *Smith* Court expressed confidence that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well," pointing to the number of States that have made an exception to their drug laws for sacramental peyote use. *Id.* *See also Lee v. Weisman*, 112 S. Ct. 2649, 2676-2677 (1992) (Souter, J., concurring). The New York Legislature was not acting unconstitutionally when it was similarly solicitous of the needs of another minority religious group.

If the rationale of the decision below were correct, no law could ever be enacted to accommodate the religious principles of a minority. Exempting sacramental peyote use from a general prohibition against the possession of drugs, for example, would constitute a "symbolic union between church and state" in the same manner as does the legislation that has been challenged in this case. And the legislative

exemption that was sustained against constitutional challenge in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), benefited only religious entities and, under the reasoning of the court below, amounted to a "symbolic union between church and state" in the same way as did Chapter 748. Rejection of that claim in *Amos* requires its rejection in this case.

(e) ***Violation of the Free Exercise Clause*** — Finally, the expectation of the majority below that "only members of the Hasidic sect will likely serve on the school board" (p. 12a, *infra*) is an impermissible reason for striking down the statute. In this regard, the decision below conflicts, in principle, with *McDaniel v. Paty*, 435 U.S. 618 (1978), where this Court held that a state law disqualifying clergy from legislative office violated the Free Exercise Clause. The *McDaniel* Court's conclusion that "the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts" (435 U.S. at 629) applies even more forcefully to individuals who are not even clergy but are devoutly religious laymen. In fact, operation of the Kiryas Joel public school under the current school board has not been challenged in this purely facial attack on Chapter 748. The effect of the New York court's decision is to deprive the residents of Kiryas Joel of the right to self-governance simply because all adhere to the same faith. That is tantamount to imposing special disabilities on the basis of religious views or religious status. *Employment Division v. Smith*, 494 U.S. 872, 877 (1990).

2. The Decision Below Conflicts With This Court's Decision in *Wolman v. Walter*.

The decision below also conflicts with this Court's decision in *Wolman v. Walter*, 433 U.S. 229 (1977). In that case, this Court considered various forms of "state aid to pupils in church-related elementary and secondary schools" (433 U.S. at 232) and concluded that "providing therapeutic and remedial services at a neutral site off the premises of the non-public schools will not have the impermissible effect of advancing religion" (433 U.S. at 248). The Court found no constitutional infirmity arising from the "fact that a unit on a neutral site may . . . serve only sectarian pupils" because the dangers to be avoided by the Establishment Clause arise "from the nature of the institution, not from the nature of the pupils." 433 U.S. at 247-48. *See also School District of Grand Rapids v. Ball*, 473 U.S. 373, 391 & n.10 (1985) (reaffirming *Wolman* and the "neutral site" rule); *Aguilar v. Felton*, 473 U.S. 402, 426 (1985) (O'Connor, J., dissenting) ("Our Establishment Clause decisions have not barred remedial assistance to parochial school children, but rather remedial assistance on the premises of the parochial school.").

The New York Court of Appeals majority premised its finding of an impermissible "symbolic union" in part on its assumption that "only Hasidic children will attend the public schools in the newly established school district" (p. 12a, *infra*). This stated reason squarely conflicts with the holding in *Wolman*, that only the "nature of the institution" and not "the nature of the pupils" can lead to a finding of unconstitutionality.

3. This Case Should Be the Vehicle for Overruling *Lemon v. Kurtzman*.

If the distinctions we have previously discussed between this case and the rulings that have followed *Lemon v. Kurtzman*, 403 U.S. 602 (1971), are not deemed persuasive, a writ of certiorari should nonetheless be granted so that the full Court may render an authoritative ruling on the continued vitality of the *Lemon v. Kurtzman* precedent.

A majority of the members of this Court have, in their own opinions or in joining the opinions of others, expressed the view that the three-pronged test of *Lemon v. Kurtzman* is erroneous and/or unworkable. *See Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 2149-2150 (1993) (Scalia, J., concurring in the judgment) (collecting cases). So long as the *Lemon v. Kurtzman* precedent remains the law, however, it creates great uncertainty for the lower courts. Application of its three-pronged test -- and particularly the open-ended "primary effect" prong -- diverts attention from other real evils at which the Establishment Clause was directed. The consequence is that courts erroneously strike down wholly benign actions by governmental bodies that demonstrate tolerance for all strands of America's diverse society and permit the "multiplicity of sects" that James Madison encouraged. *The Federalist* No. 51, p. 326 (H. Lodge ed. 1908).

This Court should resolve, once and for all, whether *Lemon v. Kurtzman* will be retained as the beacon by which legislatures and lower courts are to be guided to a safe shore. By granting a writ of certiorari in this case and inviting the parties and *amici* to present argument on the continued

viability of *Lemon v. Kurtzman*, as well as to suggest potential substitutes for the *Lemon v. Kurtzman* standard, the Court will be able to give full attention to an issue of great importance to the Nation and arrive at a suitable and correct resolution.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)
LISA D. BURGET
MILLER, CASSIDY, LARROCA
& LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

September 1993

Attorneys for Petitioner

APPENDIX

APPENDIX A

STATE OF NEW YORK

COURT OF APPEALS

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3 No. 120
Louis Grumet, &c., et al.,
Respondents,
v.
Board of Education of the Kiryas Joel Village School District, et al.,
Appellants.

OPINION

Nathan Lewin, for appellant BOE Kiryas Joel Village.
Lawrence W. Reich, for appellant BOE Monroe-Woodbury.
Julie S. Mereson, for Attorney General.
Jay Worona, for respondents.
American Jewish Congress; New York State United Teachers; Committee for Public Education and Religious Liberty; and Anti-Defamation League, *amici curiae*.

No. 120

SMITH, J.:

Plaintiffs, citizen taxpayers of this State, maintained this action against defendants Board of Education of the Kiryas Joel Village School District and Board of Education of the Monroe-Woodbury Central School District, challenging the enactment of Chapter 748 of the Laws of 1989. That statute established a separate public school district in and for the Satmarer Hasidic Village of Kiryas Joel, Orange County. [1] Plaintiffs alleged that Chapter 748 of the Laws of 1989 violates the establishment clause of the First Amendment of the Federal Constitution. Supreme Court granted plaintiffs' summary judgment motion, concluding, *inter alia*, that Chapter 748 of the Laws of 1989 has the effect of advancing the religious beliefs of the Satmarer Hasidim inhabitants of the village of Kiryas Joel. The Appellate Division affirmed, determining that the challenged statute violates the second prong of the test in *Lemon v. Kurtzman*, 403 US 602 (187 AD2d 16).

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[1] Chapter 748 of the Laws of 1989, provides, in part:

§1. The territory of the village of Kiryas Joel in the Town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law.

§2. Such district shall be under the control of the board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

No. 120

Defendants appeal as of right from the order of the Appellate Division which finally determines an action that directly involves the construction of the Federal Constitution (CPLR 5601[b][1]). The issue before us is whether Chapter 748 of the Laws of 1989, entitled "AN ACT to establish a separate school district in and for the village of Kiryas Joel, Orange county", violates the establishment clause of the First Amendment of the Federal Constitution. We now modify the order of the Appellate Division, agreeing that the statute violates the establishment clause of the First Amendment of the Federal Constitution.

I.

The Village of Kiryas Joel was formed by, and is composed almost entirely of members of the Satmarer Hasidic sect. In addition to separation from the outside community, separation of the sexes is observed within the village. Yiddish is the principal language of Kiryas Joel. No television, radio, or English language publications are generally used. There is a male and female dress code. For the most part, the children are educated in religiously affiliated schools. The boys attend the United Talmudic Academy and are educated in the Torah. The girls attend Bais Rochel and are instructed on what they will need to function as adult women (*see*, *Board of Educ. v. Wieder*, 72 NY2d 174, 179-180). These differences have led to a series of court cases involving the Satmarer Hasidim. [2]

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[2] (*See*, e.g., *Parents' Assn v. Quinones*, 803 F2d 1235 [the Second Circuit preliminarily enjoined implementation of a plan by the New York City Board of Education to provide federally funded remedial education

Prior to the decision of the United States Supreme Court in *Aguilar v Felton* (473 US 402 [1985]), the handicapped children living in Kiryas Joel received special education services from Monroe-Woodbury Central School District personnel in an annex to one of the Kiryas Joel religious schools. In *Aguilar*, the United States Supreme Court considered whether a program under Title I of the Elementary and Secondary Education Act of 1965 authorizing the use of federal funds to pay salaries of public employees who teach in parochial schools violated the Establishment Clause of the First Amendment. Concluding that such a program was unconstitutional, the Court stated: "We have long recognized that underlying the Establishment Clause is 'the objective * * * to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other * * *' *Lemon v Kurtzman*, *supra*, at 614 [and] * * * the scope and duration of [the] Title I program would require a permanent and pervasive state presence in the sectarian schools receiving aid" (*id.* at 412-413). In response to the *Aguilar* decision, the Monroe-Woodbury Central School District stopped providing the special education programs at the religious school annex. For some time thereafter, some

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for handicapped girls from Beth Rochel school by closing off nine classrooms of a public school, and dedicating them to the use of the Hasidic girls]; *Bollenbach v Board of Educ.*, 659 F Supp 1450 [The District Court found that the deployment of only male bus drivers to the all-boys United Talmudic Academy had the primary effect of advancing religious beliefs]; *Board of Educ v. Wieder*, 72 NY2d 174 [This Court concluded that Education Law § 3602-c neither compels the Board of Education of the Monroe-Woodbury Central School District to nor prohibits the Board from providing private school handicapped children with special services at the private schools or at a neutral site]).

of the handicapped Satmarer Hasidic children attended special education classes held at the Monroe-Woodbury public schools. However, allegedly because of the "panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different from theirs," the parents stopped sending them to programs offered at the public schools (*Board of Educ. v Wieder*, 72 NY2d at 181, *supra*).

In *Board of Educ. v. Wieder*, *supra*, this Court construed Education Law § 3602-c [3] to authorize special education services to private school handicapped children and afford them an option of dual enrollment in public schools. We concluded that section 3602-c neither compels boards of education to make special education services available to private school handicapped children only in regular public school classes and programs, nor renders them powerless to provide otherwise (*id.* at 187).

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[3] Education Law § 3602-c[2] provides, in part:

Boards of education of all school districts of the state shall furnish services to pupils who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent, guardian or person legally having custody of any such pupil.

Section 3602-c(1)(a) defines "services" as "instruction in the areas of gifted pupils, occupational and vocational education and education for students with handicapping conditions * * *."

Thereafter, the Legislature enacted Chapter 748 of the Laws of 1989, which created a new union free school district, the Kiryas Joel Village School District, in the incorporated village of Kiryas Joel in the town of Monroe, Orange County. The newly established Kiryas Joel Village School District was coterminous with the Satmarer Hasidic community of Kiryas Joel, and was created within the boundaries of the Monroe-Woodbury Central School District. Chapter 748 of the Laws of 1989 also established a board of education, composed of five to nine members elected by the voters of the village, that would serve for a period not to exceed five years. Chapter 748 of the Laws of 1989 represents "an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, whose population are all members of the same religious sect" (Governor's Approval Mem, Bill Jacket, L 1989, ch 748).

Plaintiffs Louis Grumet and Albert Hawk commenced this action individually, as citizen taxpayers, and as Executive Director of the New York State School Boards Association, Inc. and President of the New York State School Boards Association, Inc., respectively, against the New York State Education Department and various State officials, alleging, *inter alia*, that Chapter 748 of the Laws of 1989 violates the establishment clause of the First Amendment of the Federal Constitution. The Board of Education of the Kiryas Joel Village School District and the Board of Education of the Monroe-Woodbury Central School District intervened as defendants. The parties stipulated to a discontinuance of the action as to the State officials, but,

pursuant to Executive Law § 71, the State Attorney General continued to appear in this action in support of the constitutionality of Chapter 748 of the Laws of 1989. Both parties sought summary judgment. On their motion, plaintiffs asserted that Chapter 748 violates the Federal constitutional provisions prescribing separation of church and state. Defendants sought a judgment declaring the facial constitutionality of the statute.

Supreme Court granted plaintiffs' summary judgment motion, concluding that the statute is unconstitutional because it "was enacted to meet exclusive religious needs and has the effect of advancing, protecting and fostering the religious beliefs of the inhabitants of the school district[, and] * * * fosters excessive entanglements with religion" (*Grumet v Board of Educ. of the Kiryas Joel Vil. School Dist.*, Sup Ct, Albany County, January 22, 1992, Kahn, J. Index No. 1054-90). The Appellate Division affirmed, concluding that Chapter 748 of the laws of 1989 "authorizes a religious community to dictate where secular public educational services shall be provided to the children of the community [and] * * * creates the type of symbolic impact that is impermissible under the second prong of the *Lemon* test" (187 AD2d 16, 22).

The prior courts concluded that plaintiffs fulfill the requirement for citizen-taxpayer status contained in State Finance Law § 123-a and, therefore, have standing to maintain this action. That conclusion is not contested on this appeal.

II.

Before this Court, defendants maintain that, based on *Lemon v Kurtzman*, *supra*, Chapter 748 is constitutionally valid on its face.

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion" (US Const 1st Amend). The First Amendment is made applicable to the states by the Fourteenth Amendment (*see*, *Everson v Board of Educ.*, 330 US 1; *Murdock v Pennsylvania*, 319 US 105). It is said that the Establishment Clause of the First Amendment means at least that "[n]either a state nor the Federal Government * * * can pass laws which aid one religion, aid all religions, or prefer one religion over another" (*Everson*, 330 US 1, 15, *supra*). As such, Federal and State governments "must maintain a course of neutrality among religions, and between religion and non-religion" (*Grand Rapids School Dist. v Ball*, 473 US 373, 382).

In *Lemon v Kurtzman*, *supra*, the United States Supreme Court articulated a three-part test for evaluating the constitutionality of governmental actions under the Establishment Clause. The Court stated:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v Allen*, 392 US 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion * * *" *Walz[v Tax Commission*, 397 US 664, 674] (*id.* at 612-613).

The United States Supreme Court has "particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children" (*Grand Rapids School Dist. v Ball*, 473 US 373, 383, *supra*). Recently, the Court adhered to the *Lemon* test in *Lamb's Chapel v Center Moriches Union Free School Dist.*, ____ US ____, 61 USLW 4549. Moreover, the Court has applied *Lemon* in considering whether prior courts were correct in concluding, on a motion for summary judgment, whether a statute was unconstitutional on its face (*see*, *Bowen v Kendrick*, 487 US 589, 602). Likewise, we have applied the *Lemon* test to statutes or regulations relating to the education of children, where such statutes or regulations are challenged as violating the Establishment Clause (*see*, *New York State School Bds. Assn v Sobol*, 79 NY2d 333; *Matter of Klein [Harnett]*, 78 NY2d 662). Thus, we apply the *Lemon* test to examine whether the prior courts were correct in concluding that Chapter 748 of the Laws of 1989 is unconstitutional on its face.

III.

While both parties have briefed the first prong of the *Lemon* test, and the Supreme Court found a violation of that prong, the Appellate Division relied exclusively on the second prong and found it violated by the statute here. Because we conclude that the second prong of *Lemon* has been clearly violated, we do not address the first prong.

As stated, the second prong of *Lemon* requires that the principal or primary effect of legislation be one that neither advances nor inhibits religion. Thus, we consider whether the principal or primary effect of the challenged statute advances or inhibits religion. It is clear that the prohibition against state involvement in religion is not limited to direct and funded efforts to indoctrinate citizens in specific religious beliefs but includes a close identification of the responsibilities of government and religion (*see*, *Grand Rapids School Dist. v Ball*, 473 US 373, 389). In that case, the Supreme Court stated the following:

> Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any -- or all -- religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a

> message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated (*id.*).

In considering whether the principal or primary effect of the challenged statute advances or inhibits religion, the concern is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denomination as an endorsement, and by nonadherents as a disapproval, of their individual religious choices" (*id.* at 390). An inquiry into this kind of effect "must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years [since t]he symbolism of a union between church and state is most likely to influence children of tender years" (*id.*). Context determines whether a particular governmental action is likely to be perceived as an endorsement of religion (*see*, *Allegheny County v Greater Pittsburgh Am. Civ. Liberties Union*, 492 US 573, 595-597, *supra*). Governmental action "endorses" religion if it favors, prefers, or promotes it (*see*, *Edwards v Aguillard*, 482 US 578, 593, *supra*; *Wallace v Jaffree*, 472 US 38, 59-60, *supra*, *Lynch v Donnelly*, 465 US 668, 691, *supra*).

Defendants assert that "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the [challenged] statute would perceive it as [the State's endorsement of the Satmarer Hasidic faith]" (*Wallace v Jaffree*, 472 US 38, 76, *supra* [O'Connor, J., concurring]). However, as the dissent acknowledges, "the Supreme Court has not adopted Justice

O'Connor's [objective observer] nuance for detecting an [impermissible] endorsement" of religion by the State (dissent, at p. 11). We agree with the majority of the Appellate Division that the statute not only authorizes a religious community to dictate where secular public educational services shall be provided to the children of the community, but also "creates the type of symbolic impact that is impermissible under the second prong of the *Lemon* test" (187 AD2d, at 22, *supra*).

Chapter 748 of the Laws of 1989 created a new union free school district, the Kiryas Joel Village School District, coterminous with the incorporated village of Kiryas Joel in the town of Monroe, Orange County. This new school district was created within the Monroe-Woodbury Central School District. The statute also established a board of education, composed of five to nine members elected by the voters of the village, that would serve for a period not to exceed five years. The residents of the village of Kiryas Joel are almost exclusively of the Satmarer Hasidic religious sect. Thus, only Hasidic children will attend the public schools in the newly established school district, and only members of the Hasidic sect will likely serve on the school board. We conclude that this symbolic union of church and state effected by the establishment of the Kiryas Joel village school district under Chapter 748 of the Laws of 1989 is sufficiently likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval, of their individual religious choices. Thus, the principal or primary effect of Chapter 748 of the Laws of 1989 is to advance religious beliefs.

The dissent's attempt to analogize this case to the recent Supreme Court case of *Zobrest v Catalina Foothills School Dist*, _____ US _____, 61 USLW 4641, *supra*, is unavailing. In *Zobrest*, the petitioners, a deaf child and his parents, commenced the action challenging the school district's refusal to provide a sign language interpreter to accompany the child to classes at a Roman Catholic high school. The petitioners alleged that the Individuals with Disabilities Education Act (IDEA) and the free exercise clause of the First Amendment to the Federal Constitution required the school district to provide the interpreter, and that the establishment clause did not bar such relief. Concluding that the establishment clause did not bar religious groups from receiving general, "neutral" governmental benefits such as a sign language interpreter, the Supreme Court held:

> The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "handicapped" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state

> decisionmaking * * *. When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," * * * it follows under prior decisions that provision of that service does not offend the Establishment Clause (slip opn, at 7-8).

We disagree with the dissent's assertion that "no message of endorsement for Satmar theology or its particular separatist tenets * * * can fairly be inferred" (dissent, at p. 13) from a statute that creates a new school district within an existing school district and establishes a board of education, composed entirely of residents of the village of Kiryas Joel who are almost exclusively of the Satmarer Hasidic religious sect. Here, unlike in *Zobrest*, *supra*, the statute creating a school district and establishing a board of education coterminous with the Satmarer Hasidic village of Kiryas Joel cannot be viewed as part of a general government program. Rather, as stated, the statute represents an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, whose population are all members of the same religious sect. Thus, it cannot be said that by the creation of the Kiryas Joel Village School District, the government is offering "a neutral service * * * as part of a general program that 'is in no way skewed towards religion.'"

The United States Supreme Court case of *Wolman v Walter* (433 US 229) is inapposite. There the Court held that "considerations of safety, distance and the adequacy of accommodations" could justify a public school's provision of

remedial services in mobile units located on neutral sites near nonpublic school premises (*see*, *Wolman v Walter*, 433 US, at 247, n 14, *supra*). Contrary to the assertion by the dissent, the legislation at issue in this case does not effect a "unit on a neutral site" serving only sectarian pupils (*see*, dissent, at p. 15). Rather, the statute creates an entirely new school district coterminous with the Satmarer Hasidic community of Kiryas Joel and establishes a school board composed of members elected by the voters of the village. This goes beyond any directive by the Supreme Court or this Court for the provision of special services to handicapped children at a neutral site (*see*, *Wolman v Walter*, 433 US 229, 248, *supra*; *Board of Educ v Wieder*, 72 NY2d 174, 188, *supra*).

Because special services are already available to the handicapped children of Kiryas Joel, the primary effect of Chapter 748 is not to provide those services, but to yield to the demands of a religious community whose separatist tenets create a tension between the needs of its handicapped children and the need to adhere to certain religious practices. Regardless of any beneficent purpose behind the legislation, the primary effect of such an extensive effort to accommodate the desire to insulate the Satmarer Hasidic students inescapably conveys a message of governmental endorsement of religion. Thus a "core purpose of the Establishment Clause is violated" (*see*, *Grand Rapids School Dist. v Ball*, 473 US 373, 389, *supra*).

Our conclusion does not, as the dissent declares, "drap[e] a drastic, new disability over the shoulders of young pupils solely on account of the religious beliefs of their

community," nor does it "penalize and encumber religious uniqueness" (*see*, dissent, at 20-21). Special services are made available to the Satmarer student within the Monroe-Woodbury school district. Our decision does not impose any additional burdens on the students within Kiryas Joel; it simply determines that the legislature may not treat the Satmarer community as separate, distinct and entitled to special accommodation.

IV.

The Supreme Court has noted that "[i]f a statute violates any of [the three *Lemon*] principles, it must be struck down under the Establishment Clause" (*Stone v Graham*, 449 US 39, 40-41). Thus, our conclusion that Chapter 748 of the Laws of 1989 violates the second principle of *Lemon* makes it unnecessary for us to comment on whether the statute violates the first and third principles or to address appellants' remaining contentions.

Without any separate analysis, the trial court declared the statute unconstitutional under article XI, section 3 of the State Constitution, suggesting that the provision is a "counterpart" to the Establishment Clause. The Appellate Division affirmed on both State and Federal Constitutional grounds, although its discussion, like the trial court's, was limited to the Establishment Clause. Moreover, in this Court the First Amendment is the subject of the parties' focus. In these circumstances, we do not reach the State constitutional issue, which is based on a provision significantly different from the Establishment Clause, both in text and history (*see*,

Judd v Board of Educ., 278 NY 200) and we modify the Appellate Division order accordingly.

Accordingly, the order of the Appellate Division should be modified, with costs to plaintiffs, in accordance with the opinion herein and, as so modified, affirmed.

Grumet v Kiryas Joel

No. 120

KAYE, CHIEF JUDGE (concurring):

Applying the three-pronged *Lemon v Kurtzman* (403 US 602) test, the Court concludes that creation of the Kiryas Joel Village School District violates the Establishment Clause. While I agree that the Laws of 1989, chapter 748 breaches *Lemon*'s second prong, and thus join the Court's Opinion, I do not believe that *Lemon* supplies the preferred analytical framework for this case. Rather, in my view, legislation that singles out a particular religious group for special benefits or burdens should be evaluated under a strict scrutiny test, requiring that the law be closely fitted to a compelling State interest.

The law at issue is precisely the sort of legislation that should be strictly scrutinized, because it provides a particular religious sect with an extraordinary benefit: its own public school system. Although I am willing to assume that the law is addressed to a compelling governmental interest--providing special education and related services to disabled children who would otherwise go without such assistance--the law is

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not closely fitted to that purpose, as far more moderate measures were available to satisfy that purpose. Accordingly, irrespective of the *Lemon* test, [1] I believe the law violates the Establishment Clause.

I.

My analysis begins with the recognition that, factually, this case is unlike prior Supreme Court cases involving the relationship between religion and education. Prior cases generally fall into two broad categories: public aid to parochial schools or students, [2] and religious activities

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[1] The *Lemon* test has been criticized by many of the Supreme Court Justices in their individual opinions (*see, Lamb's Chapel v Center Moriches Union Free School Dist.*, _____ US _____, 61 USLW 4549, 4553 [Scalia, J., concurring] [collecting cases]). Indeed, the test was not even invoked by the majority in *Zobrest v Catalina Foothills School Dist.* (_____ US _____, 61 USLW 4641), the Court's most recent Establishment Clause case.

[2] *Zobrest v Catalina Foothills School Dist.* (_____ US _____) (sign language interpreter for parochial school student); *Aguilar v Felton* (473 US 402) (public school instructors teaching on premises of parochial schools); *Witters v Washington Dept. of Services for the Blind* (474 US 418) (aid to blind student attending sectarian college); *Grand Rapids School Dist v Ball* (473 US 373) (similar); *New York v Cathedral Academy* (434 US 125) (reimbursement for recordkeeping and testing); *Wolman v Walter* (433 US 229) (textbooks, diagnostic services, remedial education, standardized tests, field trip transportation); *Roemer v Board of Public Works* (426 US 736) (grants to private colleges); *Meek v Pittenger* (421 US 349) (textbooks, instructional materials and various on-site services); *Committee for Public Education v Nyquist* (413 US 756) (funds for maintenance and repair, tuition reimbursement and tax benefits to parents); *Levitt v Committee for Public Education* (413 US 472) (funds for testing); *Hunt v McNair* (413 US 734) (revenue bonds for sectarian-affiliated universities); *Tilton v Richardson* (403 US 672) (federal

within public schools [3] (*see, Committee for Public Education v Nyquist*, 413 US 756, 772 [identifying categories]). This case falls into neither category: the law does not provide aid to a parochial school, and it does not prescribe religious practices for a public school.

This case also differs from previous Establishment Clause education cases in a more fundamental respect. Chapter 748 is not one of the myriad "governmental programs that neutrally provide benefits to a broad class of citizens defined without reference to religion" (*Zobrest v Catalina Foothills School Dist*, ____ US ____, ____, 61 USLW 4641, 4644). Rather, the legislation was specifically designed to benefit Satmar Hasidim, who refuse to send their disabled children to integrated Monroe-Woodbury public

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construction grants); *Lemon v Kurtzman* (403 US 602) (teachers' salaries, textbooks, instructional materials); *Earley v DiCenso* (403 US 602) (salary supplements); *Board of Educ. v Allen* (392 US 236) (textbooks); *Everson v Board of Education* (330 US 1) (bus transportation).

[3] *Lee v Weisman* (112 S Ct 2649) (prayer at graduation ceremony); *Edwards v Aguillard* (482 US 578) (statute prohibiting teaching of evolution unless accompanied by instruction in theory of "creation science"); *Wallace v Jaffree* (472 US 38) (period of silence for "meditation or voluntary prayer"); *Stone v Graham* (449 US 39) (posting of Ten Commandments); *Abington School Dist v Schempp* (374 US 203) (prayer and Bible reading at beginning of each school day); *Engel v Vitale* (370 US 421) (prayer); *Epperson v Arkansas* (394 US 97) (statute barring theory of evolution); *Illinois ex rel. McCollum v Board of Educ.* (333 US 203) (religious instruction by sectarian teachers); *see also, Lamb's Chapel v Center Moriches Union Free School Dist.* (____ US ____, 61 USLW 4549) (use of school premises by religious group); *Board of Educ. v Mergens* (496 US 226) (same); *Widmar v Vincent* (454 US 263) (same); *Zorach v Clauson* (343 US 306) (students released from public school classes for religious instruction).

schools. That the law is not part of a neutral, generally applicable program of state aid but instead was intended to benefit one religious group distinguishes this case, and calls for a different analysis.

The Religion Clauses of the First Amendment protect fundamental liberties and therefore apply to the States through Fourteenth Amendment's Due Process Clause (*Cantwell v Connecticut*, 310 US 296, 303). Although the Equal Protection Clause of the Fourteenth Amendment has been a bulwark against arbitrary government distinctions based on race (*Loving v Virginia*, 388 US 1, 11), gender (*Craig v Boren*, 429 US 190, 197-199), national origin (*Hernandez v Texas*, 347 US 475, 479), alienage (*Graham v Richardson*, 403 US 365, 371-372) and illegitimacy (*Trimble v Gordon*, 430 US 762, 766), it has not been necessary to identify religion as a suspect classification for equal protection purposes; classifications along religious lines are strictly scrutinized in any event. "Just as we subject to the most exacting scrutiny laws that make classifications based on race, * * * or on the content of speech, * * * so too we strictly scrutinize governmental classifications based on religion" (*Employment Div., Dept of Human Resources of Oregon v Smith*, 494 US 872, 886 n2 [citations omitted]; *see*, 3 Rotunda and Nowak, Treatise on Constitutional Law § 18.40, at 491-494 [2d ed. 1992]).

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." (*Larson v Valente*, 456 US 228, 244.) It is thus axiomatic that the government "must maintain a course of neutrality among religions" (*Grand Rapids School Dist. v Ball*, 473 US 373, 382; *see also, Epperson v Arkansas*, 393 US 97, 104 ["The First

Amendment mandates government neutrality between religion and religion"]; *Zorach v Clauson*, 343 US 306, 314 ["government must be neutral when it comes to competition between sects"]).

The State is in the greatest danger of straying from its required course of neutrality when it selects a particular religious sect for special privileges or burdens. "'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders'" (*Church of the Lukumi Babalu Aye v City of Hialeah*, ____ US ____, ____, 61 USLW 4587, 4591, quoting *Walz v Tax Commission*, 397 US at 696 [Harlan, J., concurring]). Laws intentionally designed to hamper a group's religious practices violate the Free Exercise Clause unless they are narrowly tailored to a compelling government interest (*see*, *Church of the Lukumi Babalu Aye*, ____ US at ____, 61 USLW at 4594). By the same token, a law affording a benefit to one religious group violates the Establishment Clause if it too is not narrowly tailored to a compelling government interest. [4]

Larson v Valente (456 US 228) is a recent application of strict scrutiny to strike down a law under the Establishment Clause. In that case, a Minnesota statute

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[4] A "benefit" addressed to one religious group may be related to Free Exercise values, and thus would not be constitutionally objectionable if sufficiently tailored. For example, a state may choose to exempt from criminal drug laws the possession of peyote by those whose religious beliefs mandate sacramental use of that drug (*see*, *Employment Div., Oregon Dept. of Human Resources v Smith*, 494 US at 890). But if the exemption is too broad -- permitting, for instance, members of the affected religious group to also possess and traffic in heroin and cocaine, that could, in my view, violate the Establishment Clause.

imposed certain reporting requirements on charities but exempted religious organizations receiving more than half their contributions from members. The Court concluded that the *Lemon* test is intended "to apply to laws affording a uniform benefit to *all* religions" (456 US at 252; *see also*, *Corporation of the Presiding Bishop v Amos*, 483 US 327, 339), but that when a law expresses "a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." (456 US at 246; *see also*, *Smith*, 494 US at 886 n2; *County of Allegheny v ACLU*, 492 US 573, 608-609; *Lynch v Donnelly*, 465 US 668, 687 n13.)

The *Larson* Court determined that the distinction between religious groups was a legislatively-sanctioned denominational preference, and thus the law was invalid unless it was justified by a "compelling governmental interest" and was "closely fitted to further that interest" (456 US at 247). The Court assumed that the statute was addressed to a compelling governmental interest--to protect citizens against abusive solicitation practices--but concluded that it was not "closely fitted" to those interests and therefore violated the Establishment Clause (456 US at 248-251).

Larson is of course distinguishable from the present case in that the Minnesota statute discriminated among religions while here the law is aimed simply at one religion. In my view, however, that distinction does not necessarily alter the analysis. A forbidden denominational preference can result from a grant of benefits to one religious group as readily as discrimination among sects. In either case, the specter of official favoritism looms large, and the legislation should be carefully scrutinized.

II.

The creation of the carved-out school district is precisely the type of legislation that should be subjected to strict scrutiny. Although the law does not, on its face, make reference to the Satmar Hasidic sect, "[f]acial neutrality is not determinative" (*Church of the Lukumi Babalu Aye v City of Hialeah*, ____ US at ____, 61 USLW at 4590). No one disputes that the purpose of the law was to create a new school district to provide disabled children of the Satmar faith with special education services in a segregated environment. Accordingly, in these circumstances the coterminality of the school district and the Village is of no moment (*see* dissent at 7): the law was "an effort to resolve a longstanding conflict between the Monroe-Woodbury School District and the village of Kiryas Joel, *whose population are all members of the same religious sect.*" (Governor's Mem, 1989 McKinney's Session Laws of NY, at 2429 [emphasis added]). Without doubt, the law was designed to confer a benefit on a particular religious group.

Plainly this special interest legislation cannot be equated with the statutory scheme in *Zobrest v Foothills School Dist.* (____ US ____, 61 USLW 4641) (*see* dissent at 10, 12, 16-17). There, a parochial school student sought a sign language interpreter as "part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends" (____ US at ____, 61 USLW at 4644). Thus, the law was entirely neutral in relation to individual religions. Here, by contrast, the State engaged in *de jure* segregation for the benefit one religious group. Establishment of a public school district intentionally

segregated along religious lines is a classic example of government action that must be "survey[ed] meticulously."

Turning then to the required strict scrutiny, I assume, for sake of analysis, that the "intractable problem" (Governor's Mem approving L 1989, ch 748, 1989 McKinney's Sessions Laws of NY, at 2429) of delivering special education services to Satmar children presented a compelling, secular government interest. Indeed, if protecting citizens against abusive solicitation practices may be considered a compelling (*see*, *Larson v Valente*, 456 US at 248), surely the provision of special education services qualifies.

Nevertheless, in my view the statute violates the Establishment Clause because the legislative response plainly went further than necessary to resolve the problem. While defendants and the dissent characterize the new school district simply as a "neutral site" for the delivery of special services (*see*, *Wolman v Walter*, 433 US 229, 248), this legislation, establishing an entirely new and separate school district, is significantly broader. Interestingly, although the dissent stresses that only a facial challenge is presented, it relies on how the statute has been implemented--for example, that the new district presently provides only special education services. On this facial challenge, the Court must consider the full scope of the statute, which creates a new school district vested with "*all the powers and duties of a union free school district*" (L 1989, ch 748, emphasis added).

The impact of the Legislature's remarkable action of carving out a new school district coterminous with a religious enclave must not be assessed in a vacuum but measured against history. For almost 40 years, ever since the

landmark decision in *Brown v Board of Education* (347 US 483), government-sponsored segregation efforts have been unlawful (*see, e.g., United States v Scotland Neck City Board of Educ.*, 407 US 484, 489-490 [carving out new school district from existing one impermissible because it impedes desegregation]; *compare*, Education Law § 2590-b[3][a][iv] ["heterogeneity of pupil population" a criterion in creating local school districts]; *Mississippi Univ. for Women v Hogan*, 458 US 718 [gender-based admissions policy unconstitutional]). Against this historical backdrop, the "symbolic impact" (*Grand Rapids School Dist. v Ball*, 473 US at 390, *supra*) of creating a new school district to serve the needs of a particular religious group cannot be underestimated.

The law's overbreadth, however, goes beyond symbolism. The impasse between Monroe-Woodbury and the Satmarer concerned only special education services for disabled children. Nevertheless, the Legislature responded by creating a new public school district vested with *all* the powers of a union free school district, which are vast. [5]

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[5] "The board of education of a union free school district, in addition to having in all respects the superintendence, management, and control of the educational affairs of the district, is given numerous more specific duties and powers. Thus, it is empowered and duty-bound to adopt bylaws and rules for its government as proper in the discharge of its duties; establish rules and regulations concerning the order and discipline of the schools; provide fuel, furniture, apparatus, and other necessaries for the use of the schools; prescribe courses of study; regulate the admission of pupils and their transfer between classes or departments; provide milk, transportation, and medical inspection of schoolchildren; provide home-teaching or special classes for handicapped and delinquent children; provide, maintain, and operate, under prescribed circumstances, cafeteria or restaurant service and other accommodations for teachers and other employees, pupils, and the elderly; and prescribe, and, when authorized, furnish, textbooks to be used in the schools. It is also authorized to purchase property and construct school buildings and facilities thereon; take and hold possession of school property; lease premises, and lease-purchase instructional equipment, for school purposes; sell and exchange school property; insure school property; sue to recover damages, and offer monetary rewards for information leading to the arrest and conviction of persons, for vandalism of such property; provide, where authorized, for lighting, janitorial care, and supervision of highway underpasses; alter former schoolhouses for use as public libraries; and explore, develop, and produce natural gas for district purposes. It is authorized to appoint teachers and librarians and to raise by tax on the property of the district any moneys required to pay the salaries of teachers employed, and also to appoint committees to visit schools and departments under its supervision and report on their condition. Likewise the board is empowered to discharge district debts or other obligations. It has prescribed powers and duties with respect to self-insurance by the district, accident insurance of pupils, insurance against personal injuries incurred by school volunteers, and group insurance and workers' compensation coverage of teachers and other employees, and may, when authorized, withhold from employees' salaries sums to be paid to specified credit unions. Finally, the board possesses all the powers, and is subject to all the duties, of trustees of common school districts, and has all the immunities and privileges enjoyed by the trustees of academies in this state." (94 NY Jur 2d, *Schools, Universities, and Colleges*, § 99, at 152-157 [1991] [citations omitted].)

Thus, for example, there is no legal impediment to the new district's operation of a public school program for non-disabled children if it chose to do so. Manifestly, the delegation of such power to the new district demonstrates that the legislation exceeded the problem that engendered it.

Perhaps the best evidence that the Legislature's resolution was not closely fitted to the problem was the availability of more moderate measures to accomplish its goal (*see, Church of the Lukumi Babalu Aye*, ____ US at ____, 61

USLW at 4592). Accepting the parents' stated reasons for not sending their children to the public schools--psychological harm to the children from being thrust into a strange environment-- then presumably the parents would be satisfied with a program directed to mitigating that trauma, without necessarily segregating the children.

Even if some sort of separate educational services were the only viable alternative, that could have been achieved without carving out a whole new school district. The Legislature could have, for example, enacted a law providing that the Monroe-Woodbury School District should furnish special education services to these children at sites not physically or educationally associated with their parochial schools. That would have satisfied the parents, and would supersede any residual claim by the District that New York statutory law precludes that action.

Such narrowly-tailored legislation would not, in my view, offend the Establishment Clause. In *Wolman v Walter* (433 US 229, 248), the Supreme Court held that "providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion." The Court had struck down previous efforts to provide remedial services on the premises of parochial schools (*see*, *Meek v Pittenger*, 421 US 349, 367-372), but as the Court explained in *Wolman*, the "dangers in *Meek* arose from the nature of the institution, not from the nature of the pupils" (*Wolman v Walter*, 433 US at 247-248; *see also*, *Grand Rapids School Dist. v Ball*, 473 US 373, 386-389; *Aguilar v Felton*, 473 US 402, 412). In the present circumstances, a law providing special education services to Satmar children at neutral sites can be considered

closely fitted to a compelling government interest. Creating a new public school district cannot.

The foregoing analysis is consistent with, and indeed substantially overlaps, *Lemon*'s second prong. The government may not make religion relevant to a person's political standing in the community (*Lynch v Donnelly*, 465 US 668, 687 [O'Connor, J., concurring]). If the government's response to a problem affecting a religious group is broader than reasonably necessary, it presents at least the perception of official favoritism or endorsement of that religion, in violation of *Lemon*'s second prong (*see*, *County of Allegheny v American Civil Liberties Union*, 492 US 573, 592-594). By carving out a fully-empowered, whole new school district in these circumstances, the Legislature has also transgressed *Lemon*.

III.

This Court's decision returns the parties to square one. It is ironic that in the wake of the Legislature's creation of a new school district for the Satmar, Monroe-Woodbury now argues that the "provision of secular instructional services to students of the same faith at a neutral site is constitutionally permissible." This approach by Monroe-Woodbury could well obviate the need for any further legislative intervention.

Grumet v Kiryas Joel

No. 120

HANCOCK, J. (concurring):

I join in Judge Smith's opinion that Chapter 748 has a primary effect of advancing religion and for that reason violates the Establishment Clause. I agree with the majority that it is, therefore, unnecessary to decide whether Chapter 748 also violates the first or purpose test of *Lemon v Kurtzman* (403 US 602). However, if the Court were addressing that issue, I would hold -- as Supreme Court and, in my view, the Appellate Division majority do -- that the statute also violates the first *Lemon* test (*see*, *Wallace v Jaffree*, 472 US 38, 56, 64 [Powell, J., concurring], 75

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[O'Connor, J., concurring]). [1] As the Appellate Division majority pointed out:

> *The challenged statute, therefore, was designed * * * to provide * * * [special education] services within the Village so that the children would remain subject to the language, lifestyle and environment created by the community of Satmarer Hasidim and avoid mixing with children whose language, lifestyle and environment are not the product of that religion.* The dissent finds a secular purpose for the statute in that it would provide the handicapped children of the Village with the publicly supported, secular special educational

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[1] That the purpose of Chapter 748 was to obviate religious objections of the Satmarers seems plain from any reasonable analysis of the statute's intent from its wording and the statutory scheme. This is borne out by the legislative history and the record. *See, for example*, Memorandum to Governor Cuomo from Assemblymen Silver urging approval, stating that the bill provides "a mechanism through which [Satmar] students *will not have to sacrifice their religious traditions in order to receive the servcies which are available* to handicapped students through out the state" (emphasis added); approval memorandum of Assembly sponsor Joseph Lentol stating that the "Hasidic jewish community *hold[s] firmly to its religious tenets*" (emphasis added); affidavit of Professor Israel Rubin (the author of the book "*Satmar, An Island In The City*" quoted in *Board of Education v Wieder*, 72 NY2d 174, 180) to the effect that "[r]eligion and its preservation in the form interpreted and practiced in Satmarer occupies a central place in virtually all matters of importance", that the Satmar schools "* * * are meant to serve primarily as a bastion against undesirable acculturation", that "[b]asically it is religion which underlies the practice of gender segregation" and that the "private schools are, of course, among the places where gender segregation is strictly observed"; excerpts from book the "*Extraordinary Groups*" by Kephart and Zellner (St. Martin's Press 1991) – *e.g.*, "The ethnocentric attitude that they alone are capable of upholding the Torah solidifies the Hasidic belief that all other groups are inferior" and "The goal of the [Satmar] community is social isolation".

> services they need and to which they are entitled, but as previously noted those services were already available to all of the handicapped children of the Monroe-Woodbury District, including the handicapped children of the Village. Thus, *the only secular need for the statute recognized by the dissent did not, in fact, exist* (*Grumet v Board of Education*, 187 AD2d 16, 21 [emphasis added]).

Chapter 748 creates a special union free school district solely for the Village of Kiryas Joel so that its residents, almost all of whom are of the Satmarer Hasidic faith, may receive separate educational services for their handicapped children at public expense in place of the services which are already available to them as residents of the Monroe-Woodbury School District. Obviously, the purpose of Chapter 748 could not have been to meet the need of the residents of Kiryas Joel for special education services; such services were already available to them under State law as to all other residents of the Monroe-Woodbury School District. What is involved here is a special act of legislative and executive grace which makes available to the Kiryas Joel residents public education services to which they *would not otherwise be entitled* (*contrast*, *Zobrest v Catalina Foothills School District*, ____ US ____, ____ SCt ____, 1993 WL 209636 [where any child qualifying under a general government program for deaf children was entitled to benefits as a matter of right "without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends" (*id.*, 1993 WL 209636, at p 5)]). In sum, Chapter 748 was enacted solely as an accommodation, not as the fulfillment of an entitlement.

Was the purpose of this accommodation anything other than religious? Unquestionably, the accommodation was to meet a requirement peculiar to the residents of Kiryas Joel -- that their children be permitted to associate only with children of the Satmar Hasidic sect. As I read the record, there is no dispute: (1) that the mandate of a separate and isolated existence is an important tenet in the Satmar Hasidic religious doctrine and inherent in the Satmar culture and way of life; or (2) that it is particularly important that this requirement of separation be strictly observed in the upbringing and education of Satmar children.

Creating the special School District which encompasses only the Village of Kiryas Joel achieved this accommodation; special education could be furnished to the children of Kiryas Joel through their own exclusive program inside the village limits where the children would mix only with the children of the Satmar faith. That a statute which is clearly intended to meet the special religious requirements of a particular sect is a statute having a religious purpose seems self-evident. If more is needed, it may be found in the record and the Legislative history of Chapter 748 (*see*, Bill Jacket, ch 748, L 1989; *see also*, Lentol Memorandum and Silver Memorandum, supra, n 1), and, indeed, in our prior decision concerning the special education for the children of this very village (*Board of Education v Wieder*, 72 NY2d 174, 179-180).

It is argued, however, that the legislative purpose of Chapter 748 was to obviate the emotional and psychological trauma of the children upon being taken from the isolation of their unique community and placed with other children whose ways are different from theirs, and that, thus, the statute has a secular purpose. But, there is nothing in the statute or its

legislative history suggesting that the enactment of Chapter 748 was related to the psychological stress of the children or prompted by anything other than the well-meaning desire to comply with the religious requirement of keeping the Satmarer children separate from other children, concededly the cause of whatever emotional or psychological effect the children may have suffered. Indeed, the Appellate Division noted:

> The record, however, contains uncontradicted evidence of a direct link between the language, lifestyle and *environment of the community's children and the religious tenets, practices and beliefs of the community*. Based upon similar evidence and in a similar procedural posture, the Court of Appeals had little difficulty finding such a connection. "'With an apparent over-all goal that *children should continue to live by the religious standards of their parents*, 'Satmarer want their school to serve primarily as a 'bastion against undesirable acculturation, as a training ground for Torah knowledge in the case of boys, and, in the case of girls, as a place to gather knowledge they will need as adult women'" (*Board of Education v Wieder*, *supra*, at 180 [emphasis added]) ([*Grumet*, *supra*, at 23, [emphasis added]).

The question is not whether some legislative solution for prescribing psychological services for the Satmar children could be devised that would have a secular purpose and thus meet the first *Lemon* test. We are concerned only with the legal question of the purpose of the specific legislation before

us. Chapter 748 establishes what amounts to a private school to furnish special education services at public expense to the residents of Kiryas Joel in order to accommodate their religiously mandated requirement of separation for their children. It does so through the extraordinary means of creating within an existing school district another co-existing district designed only to include a village whose residents are almost exclusively of a particular religious sect.

If a statute does not have a clearly secular purpose, it fails the first or "purpose" test of *Lemon* (*see*, *Wallace v Jaffree*, 472 US 38, 56). Justice Powell's explanation of the first *Lemon* test in his *Wallace* concurrence is especially apt here:

> The first inquiry under *Lemon* is whether the challenged statute has a 'secular legislative purpose.' *Lemon v Kurtzman*, *supra*, at 612. As Justice O'Connor recognizes, this secular purpose must be 'sincere'; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a 'sham.' *Post*, at 75 (concurring in judgment). In *Stone v Graham*, 449 U.S. 39 (1980) (per curiam), for example, we held that a statute requiring the posting of the Ten Commandments in public schools violated the Establishment Clause, even though the Kentucky Legislature asserted that its goal was educational (*Wallace*, *supra*, at 64 [Powell J., concurring]).

But for the Satmarers' religious mandate of separation, no statute and no governmental expenditures for special education services for the residents of Kiryas Joel would have been necessary. In short, the accommodation of the Satmarers' religious requirements "'was and is the law's [only] reason for existence'" (*Wallace*, *supra*, at 75 [O'Connor J., concurring], quoting *Epperson v Arkansas*, 393 U.S. 97, 108).

Realistically, can the legislative creation of the Kiryas Joel School District to make special additional educational services available in order to obviate the religious objections of its residents have a purpose other than religious? As a matter of common sense -- given the wording of the statute, its apparent intent and the absence of any reference to other than a religious purpose in the legislative history -- the answer must be no.

Assuming, however, that Chapter 748 can be construed as having a clearly secular purpose (*see*, *Wallace*, *supra* at 56), I believe that, in its effect, it cannot be anything but a government action which unequivocally endorses religion in violation of the second *Lemon* test (*see*, *Wallace*, at 69 [O'Connor J., concurring]). Not only have the legislative and executive branches of government acted for the special benefit of a particular religious sect in creating the Kiryas Joel School District, but their action entails state aid which will relieve the private Talmudic academies and the residents of the Kiryas Joel Village of the financial burdens of providing required special education for the

Satmarer children. [2] Thus, Chapter 748 -- like the money grants for maintenance and repair, the tuition reimbursement grants, and the income tax benefits struck down in *Committee For Public Education v Nyquist* (413 U.S. 758) -- constitutes the sort of state financial assistance for sectarian education which has the effect of furthering the religious mission in contravention of the second *Lemon* test (*see*, *School Dist. of Grand Rapids v Ball*, 473 US 373, 393-395; *Meek v Pittenger*, 421 US 349, 364-366; *Aguilar v Felton*, 473 U.S. 402, 422 [O'Connor J. dissenting]). As the Supreme Court recently stated in regard to its holdings in *Meek* and *Ball*:

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[2] The Budget Report on the Bill which was later enacted as Chapter 748 contains the following:

> Based on local wealth data provided by the Monroe-Woodbury school district, and assuming that the 100 special education pupils in the Kiryas Joel school district will be placed in programs qualifying for the high cost component of excess cost aid, *we estimate a new Kiryas Joel school district budget of about $1.3 million and new State aid of about $400,000-450,000*. This would leave a local tax bill of about $900,000. Since Monroe-Woodbury attributes about $1.4 million of its tax base to the Village of Kiryas Joel, *it appears that the Village's tax payers will benefit from both new State Aid and lower, local property taxes as a result of the creation of the new district*. Also based on data supplied by Monroe-Woodbury (and current data available from the State Education Department), *we estimate that the loss of property and income wealth attributed to the Village of Kiryas Joel will make Monroe-Woodbury poorer to the extent that it will* receive operating aid on a formula basis rather than on save-harmless, due to its then lower wealth, would not occur until the 1991-92 school year, we project such State aid increases would amount to 1.4 million [emphasis added].

[T]he programs in Meek and Ball -- through direct grants of government aid -- relieved sectarian schools of costs they otherwise would have borne in educating their students. See Witters [v Washington Dept of Services for the Blind, 474 US 481] at 487 ("[T]he State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State") (quoting Ball, supra, at 394). For example, the religious schools in Meek received teaching material and equipment from the State, relieving them of an otherwise necessary cost of performing their educational function. 421 U.S., at 365-366. "Substantial aid to the educational function of such schools," we explained, "necessarily results in aid to the sectarian school enterprise as a whole," and therefore brings about "the direct and substantial advancement of religious activity." Id., at 366. So, too, was the case in Ball: The programs challenged there, which provided teachers in addition to instructional equipment and material, "in effect subsidize[d] the religious functions of the parochial schools

by taking over a substantial portion of their responsibility for teaching secular subjects." 473 U.S., at 397. "This kind of direct aid," we determined, "is indistinguishable from the provision of a direct cash subsidy to the religious school." Id., at 395. (*Zobrest v Catalina Foothills School District*, *supra*, 1993 WL 209636, at 6).

Grumet v Kiryas Joel BOE
No. 120

BELLACOSA, J. (dissenting):

This case arises from a community's search for special education services on behalf of approximately 200 handicapped children who, as Satmarer Hasidic Jews, reside with their families in the Village of Kiryas Joel in Orange County, New York. A decade of controversy of virtually epic proportions is reflected in litigation at various levels of State and Federal courts and in unsuccessful efforts by various protagonists to forge a local, secular, public education program for the pupils with special needs of the Village of Kiryas Joel. The State of New York in 1989 enacted a law which held the promise of a Solomon-like solution.

Although invested with a presumption of constitutionality, that statute is judicially nullified as a violation, on its face, of the Establishment Clause of the First Amendment of the United States Constitution. Because I believe that the Court has erected a reverse presumption of unconstitutionality and because I agree with Justice Levine, dissenting at the Appellate Division, that the law is not facially defective, I respectfully dissent and vote to reserve.

I.

Since 1977, the Village of Kiryas Joel has been an incorporated (since 1977) municipality in the Town of Monroe, Orange County, New York, populated by Satmarer Hasidic Jews. The lifestyle of the community -- including

distinctive dress, language, and customs -- was described by this Court in *Board of Education v Wieder* (72 NY2d 174, 179-180). Before the legislation at issue, all school children of the Village, for public education purposes, were within the jurisdiction of the Monroe-Woodbury School District. Those pupils in the Village without special needs, however, receive their schooling in Satmarer Hasidim parochial schools. They are not involved in this litigation.

The challenged legislation evolved out of a series of court cases involving disputes between the residents of the Village and the Board of Education of the Monroe-Woodbury School District (which is now aligned as a party in this lawsuit with the Kiryas Joel Board of Education) concerning the provision only of special education services to the handicapped children of the Village. In 1988, when *Board of Education v Wieder* (*id.*) was decided by this Court, the Monroe-Woodbury School District had offered the Village's handicapped students the special education services to which they were entitled under Federal and State law only at the District's public schools. The Satmarer Hasidic residents of the Village demanded a neutral site within the Village. This Court held that the courts could not mandate that the location of the services be either the District's public schools or a neutral site within the village, though this Court also unanimously urged that efforts be undertaken by the protagonists to secure a neutral site and solution (*Board of Education v Wieder*, 72 NY2d, *supra*, at 189 fn 3).

Both sides nevertheless persisted in their diametrically opposed positions, and the "true subjects of this controversy" (*id.*, at 179), the handicapped Satmarer children, received no special education. The Satmarer Hasidim removed their special-needs children from the Monroe-Woodbury School

District's public schools, after an experimental effort and period, because they felt that the District's failure to accommodate their distinct language and cultural needs had a "major adverse effect on [their special-needs children's] educational progress" and on the children's psychological and emotional well-being. Ultimately, the New York State Legislature acted to end the long standoff.

Chapter 748 of the Laws of 1989 established "a separate school district in and for the Village of Kiryas Joel, Orange County". The statute granted the new school district the powers of a union free school district under the State Education Law, and provided that the district shall be controlled by a board of education, elected by the qualified voters of the Village. The Monroe-Woodbury Board of Education unanimously supported the legislation, urging the Governor to sign the bill "because it will allow for the proper education of the Kiryas Joel handicapped children. The creation of a separate school district will serve to reduce community tension and lead to productive relationships." Governor Cuomo approved the legislation, effective July 1, 1990, commenting in the official Approval Message that "[m]y Counsel [] advises that the bill is, on its face, constitutional. I am persuaded by my Counsel's view. * * * [T]his bill is a good faith effort to solve this unique problem" (Approval Message of the Governor, 1989 NY Legis Ann at 325).

The new school district operates a public school which provides education only to the district's children with special needs. Under the statute, the district must operate in a secular manner. The superintendent of the school, who is not Hasidic, served for twenty years in the New York City public school system, where he acquired expertise in the area

of bilingual, bicultural, special education for handicapped children. The teachers and therapists, all of whom live outside the Village, teach mixed classes of boys and girls a wholly secular curriculum of subjects, such as reading, writing, arithmetic, music and physical education. The statute requires the school to comply with all State laws, rules and regulations affecting public education, including a prohibition against any form of discrimination.

II.

The New York State School Boards Association ("NYSSBA") and two of its officers instituted this action in January 1990 against the New York State Education Department and various State officials, seeking a declaration of unconstitutionality of the statute. The Kiryas Joel and Monroe-Woodbury Boards of Education intervened as defendants. Although the parties stipulated to a discontinuance of the action as to the defendant State officials, the Attorney General has continued to defend the constitutionality of Chapter 748 (*see*, Executive Law §71). The organizational plaintiffs (NYSSBA and Messrs. Grumet and Hawk, in their capacities as NYSSBA officers) were ultimately found to lack standing to challenge the statute, an aspect of the case not before us. However, the two named individuals remain as taxpayers-plaintiffs-respondents.

Plaintiffs moved and defendants cross-moved for summary judgment on facial grounds only, inasmuch as no discovery or any other factual inquiry in this case has been undertaken. Supreme Court, Albany County, held that Chapter 748, on its face, violated all three prongs of *Lemon v Kurtzman* (403 US 602) and therefore violated the principle of separation of church and state. The Appellate Division

affirmed, holding that Chapter 748, on its face, violates at least the second prong of the *Lemon* test because its primary effect is the advancement of religion. This Court also strikes the law down on only prong two, the primary effect aspect of *Lemon*, although the Concurrences advance newly refined additional bases for invalidation.

Plaintiffs press their argument before this Court that Chapter 748 violates all three prongs of the *Lemon* test. Although defendants-appellants proffered a secular purpose for the legislation, plaintiffs characterize it as a "sham" (Supreme Court referred to it as a "camouflage [of] secular garments"). Plaintiffs allege that the purpose of the statute is to cater to the "religious separatist tenets" of the Satmar Hasidim. They also argue that Chapter 748 has the primary effect of advancing the religious tenets of the Satmar Hasidim, because the statute allows them to maintain their separatism. Finally, they urge that it constitutes a State endorsement of religion.

Defendants-appellants reject plaintiffs' claims on the ground that plaintiffs have not met their heavy burden of rebutting the presumptive facial constitutionality of Chapter 748 of the Laws of 1989 beyond a reasonable doubt. Defendants also demonstrate, to the contrary, that the statute should survive facial scrutiny on all three branches of the *Lemon* test and urge that it should not be struck down without evidentiary development and as-applied analysis.

III.

No one disputes that the Legislature has the fundamental power to create a union free school district within the boundaries of a previously existing school district

to facilitate the provision of public education to a particular group of students (*see*, *e.g.*, Town of Greenburgh, UFSD No. 13, Chapter 559 of the Laws of 1972; Town of Mt. Pleasant UFSD, Chapter 843 of the Laws of 1970; Granada School District Act, Chapter 92 of the Laws of 1972). Plaintiffs concede that approximately 20 such school districts have been created by acts of the Legislature.

Nevertheless, plaintiffs predicate their challenge, to what is otherwise an entirely secular act of public education administration effected by the other two Branches of State government, on their sectarian interpretation of the unique, overlapping cultural and religious characteristics of the population of the Village of Kiryas Joel and its identical geographical boundaries with the new School District. They assert that the citizens of Kiryas Joel are exclusively Satmarer Hasidim and will remain as such. However, no claim is made of any alleged restrictive covenants among the Village's property owners, or of any alleged irregularity in the conduct of municipal or school district elections, or of any exclusion of non-Hasidim in any respects of governance, employment or availment of educational services. Indeed, there is no showing that non-Satmarer Hasidim students are precluded from attending and taking advantage of this special education program. What plaintiffs assert, in sum, substance and effect, is that because the municipality and school district share identical borders and frame an enclave currently populated only by Satmarer Hasidim, the very existence of the public school district by authorization of the Legislature and Executive constitutes, on its face, an establishment of religion prohibited by the United States Constitution. The logical and inexorable extension of this canon would dictate the extinguishment of the Village itself for the identical infirmity.

IV.

To evaluate plaintiffs' claims under the currently prevailing *Lemon* test, the Court must examine the purpose and effects of the legislation, as well as the possibility of government entanglement resulting from the legislation (*see*, *NYS School Bds. Assn. v Sobol*, 79 NY2d 333, 338-339). While many personal expressions of the Justices of the United States Supreme Court question the vitality of *Lemon* (*see*, *Lamb's Chapel v Center Moriches UFSD*, et al, ____ S Ct ____, 61 USLW 4549, 4553-4554 [decided 6-7-93], Scalia, J., concurring), the institutional postulate of that Court remains unchanged -- *Lemon* controls (*id.*, at 4552 and n 7, White, J., Opn of the Court). However, the analysis in an Establishment Clause case, decided nine days later, abstains from discussion of the *Lemon* test (*see*, *Zobrest v Catalina Foothills School District*, ____ S Ct ____, 61 USLW 4641 [decided 6-16-93]).

The first *Lemon* prong -- that "the statute must have secular purpose" (*Lemon v Kurtzman*, *supra*, at 612) -- is breached only if the enactment was "motivated *wholly* by [a religious] purpose" (*Bowen v Kendrick*, 487 US 589, 602 [emphasis added]; *see*, *Wallace v Jaffree*, 472 US 38, 56). Chapter 748 was enacted for the stated purpose of allowing only handicapped pupils of the Village of Kiryas Joel to receive a publicly supported, secular special education to which they are entitled (*see*, Governor's Mem 1989 Legis Ann, at 324-325). This objective satisfies the secular purpose prong of the *Lemon* test.

Next, in considering the facial attack, the Court seems satisfied that a third-prong violation, excessive entanglement, has not been demonstrated. The Kiryas Joel public school

established for this Village is not a "pervasively sectarian environment" of the type which generally raises the entanglement problem (*see*, *e.g.*, *Aguilar v Felton*, 473 US 402; *Meek v Pittinger*, 421 US 349). The education program is exclusively and thoroughly nonsectarian; the staff is secular; all regulatory monitoring is of the traditionally-accepted educational variety and is designed to assure that the secular staff adheres to the State-approved secular curriculum (*see generally*, *Grumet v Board of Education of the Kiryas Joel Village School District*, 187 AD2d 16, 36-37 [Levine, J., dissenting]).

The Court's dispositive analysis turns ultimately on only the second *Lemon* prong, the "effects" test. Defendants contend that the educational services offered by Monroe-Woodbury School District prior to the enactment of Chapter 748 were inadequate, because the services did not accommodate "the distinct language and cultural needs of the handicapped children" in the Village, and the primary effect of the legislation is to remedy that problem. In bold dichotomy, plaintiffs' central argument that the primary effect of the statute involves "the State in sponsorship of Satmar separatist precepts" is adopted by the Court, contrary, in my view, to the spirit of the holding and analysis of *Zobrest*. The primary effect benefits the handicapped students in a secular manner; only an "attenuated" effect reaches the religion of their community.

As initially articulated, the effects prong demands of legislation that "its principal or primary effect must be one that neither advances nor inhibits religion" (*Lemon v Kurtzman*, *supra*, at 612). In subsequent application, the Supreme Court has augmented this restriction to require that any nonsecular effect be remote, indirect and incidental.

Courts attempting to apply the "effects" test must also grapple with the related subsidiary concern of whether the governmental action constitutes an "endorsement" of religion. As Justice Kennedy recently observed, however, the Supreme Court's unsettled jurisprudence in the area of possible government "endorsement" of religion leaves this sub-branch of the *Lemon* test somewhat suspect (*see*, *Lamb's Chapel v Center Moriches UFSD*, et al, ____ S Ct ____, 61 USLW 4549, 4553 [decided 6-7-93] [Kennedy, J., concurring], *supra*).

The Supreme Court has used "endorsement" as a factor for assessing whether an impermissible purpose or effect infects a challenged law (*see*, *e.g.*, *Grand Rapids School Dist. v Ball*, 473 US 373, 389); however, the meaning of "endorsement" is not "self-revealing" (*compare*, *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, ____ S Ct ____, 61 USLW 4587, 4598 [Souter, J., concurring]).

Unraveling whether a particular governmental action runs afoul of this test is a tricky and complicated process. Justice O'Connor initially proposed the "no endorsement" test in *Lynch v Donnelly* (465 US 668, 691-693 [O'Connor, J., concurring]). Its protean -- and controversial -- nature is evidenced by the fact that in that case she found that a municipality's display of a Christmas creche was not an endorsement of religion. In her view, the printing of "In God We Trust" on coins and the opening of court sessions with "God save the United States and this Honorable Court" were also not constitutionally offending endorsements (*id.*, at 693).

Justice O'Connor in *Wallace v Jaffree* (472 US 38, *supra*) offered an "objective observer" refinement to the endorsement factor. Much like the reasonable person embodied in the negligence standard, the so-called objective observer is expected to form a perception on the basis of familiarity with "the text, legislative history, and implementation of the statute" as to whether a particular State action constitutes an endorsement of religion or of a particular religious belief (*id.*, at 76). Moreover, any objective observer would presumably also be "acquainted with the Free Exercise Clause and the values it promotes" (*id.*, at 83). Thus, the objective observer should be aware of the overlap and tension between the Establishment and Free Exercise Clauses, and the permissibility of accommodation to Free Exercise concerns (*id.*). To be sure, the Supreme Court has not yet adopted Justice O'Connor's nuance for detecting an alleged endorsement, but neither has it otherwise clarified the method and criteria for unveiling an impermissible endorsement (*see*, *e.g.*, Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Enforcement" Test*, 86 Mich L Rev 266).

Reasonable minds may differ as to whether the actuality or the symbolism of the State's facilitation of publicly-administered special education to handicapped pupils of an incorporated municipality is an endorsement of the children's or their parents' religion. To allow for no reasonable doubt on a facial review and to decide this case as a forbidden establishment of a religion is at least arguable. "Objective observers" could not, in my view, so definitively conclude or perceive this situation as an establishment of a religion, without inspiring some inquiry as to whether their views perhaps suffered from a predisposed hostility to

religion in the constitutional debate sense. Truly objective observers should be able to conscientiously accept this legislation as secular, neutral and benign within the reasonable doubt spectrum (*see*, Tribe, American Constitutional Law, 1176, 1187-1190, 1221). For comparative analysis, as an example, one might view the direct aid to the handicapped pupil in a parochial school in *Zobrest* as the scaling of the wall of separation; yet, it was held constitutional under a broadly applicable analysis. In contrast, in this case the State stayed safely off and away from the forbidden wall by aiding a group of handicapped pupils in a specially created public school; yet, the Court here declares the legislative act unconstitutional. I find this perplexing, to say the least.

This Court has said that "[g]overnmental action 'endorses' religion if it favors, prefers, or promotes it" (Majority opn, at 11; *see also*, *New York State School Bds. Assn v Sobol*, *supra*, 79 NY2d, at 339). In applying that proposition at face value, the Court concludes that Satmarer Hasidism is impermissibly favored, preferred or promoted by Chapter 748. I disagree because context is key (*see*, *New York State School Bds. Assn. v Sobol*, *supra*). Here, no message of endorsement for Satmar theology or its particular separatist tenets need necessarily or can fairly be inferred, either by objective third parties or by the protagonists themselves. On the other hand, it can fairly be said that the People of the State of New York, as a whole, gain a compelling benefit in the compromise solution achieved here. The New York commonweal is primarily advanced. It should not be forgotten or overlooked that the long-simmering, underlying dispute spilled over the borders of the Village into the broader surrounding community, and resulted in a complete impasse. The legislation, judicially dissolved

in this case, was the negotiated denouement at the highest policy level available in a democracy, the State Legislature. As Professor Tribe has noted, "[l]eaving room for legislatures to craft religious accommodations recognizes that *they may be in a better position than courts* to decide when the advantages of strict neutrality are overstated" (Tribe, American Constitutional Law §14-7, at 1195 [2d ed] [emphasis added]). Former Justice Brennan emphasized this important nuance by observing that "even when the government is not compelled to do so by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion" (*Marsh v Chambers*, 463 US 783, 812 [Brennan, J., dissenting]).

The incidental, "attenuated" benefit to the minority Satmar viewpoint supports this State's rich pluralistic tradition and does not diminish, but rather enhances, the common good. I conclude that the incidental benefit to the Satmar Hasidim citizens does not render the State's legislative solution facially impermissible because:

> [i]t does not follow, of course, that government policies with secular objectives may not incidentally benefit religion. The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur. *See*, *Mueller v Allen*, 436 US 388, 393, 103 S Ct 3062, 3065, 77

L.Ed.2d 721 [1983]. (*Texas Monthly, Inc. v Bullock*, 489 US 1, 10.)

The unmistakable reality of this case is that the stricken legislation tried to create a secular public school for pupils with special education needs. The Majority concludes that the effort fails. Yet, the new public school district offers programs and services at odds with many basic precepts of Satmarer Hasidism. Secularism itself is antithetical to Hasidism, yet secularism is the *quid pro quo* imposed by the State for these Village residents to avail themselves in this way of State-regulated special educational services for their handicapped youngsters. Though the Legislature bent over backwards, as a last resort, to address the legitimate special education needs of the Satmarer students, it did not bend to the theology of their families or community (*see generally*, Tribe, American Constitutional Law §14-7, at 1195 [2d ed]). For its effort, the Legislature and Executive and the citizens who sought recourse through the democratic process are deemed religious gerrymanderers and educational segregationists (*see*, Concurring Opn, Kaye, Ch.J., at 5, 11; *contrast*, *Mtr. of Wolpoff v Cuomo*, 80 NY2d 70, 78-80).

On the other hand, there has been substantial approbation from the surrounding and affected non-Satmarer community for the fairness and equity of the State providing a secular solution for what had previously proved to be an intractable local dispute. Indeed, defendant-intervenor-appellant Board of Education of the Monroe-Woodbury Central School District has not regarded the legislation as a repudiation of the secular educational principles for which it previously and steadfastly fought as litigant against the

Satmarer Hasidim, or as an approval of the separatist tenets of the Satmar. Although it was unable to achieve a solution on its own, its present amity is noteworthy (*Board of Education v Wieder*, 72 NY2d 174, *supra*).

As the Supreme Court noted in *Wolman*, "[t]he fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in *Meek [v Pittinger]*" (*Wolman v Walter*, 433 US 229, 247). "The purpose of the program is to aid school children * * * * Certainly the Establishment Clause should not be seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community" (*id.*, at n 14). The United States Supreme Court built on those comments in *Zobrest v Catalina Foothills School District* (___ S Ct ___, 61 USLW 4641 [decided 6-16-93], *supra*) by observing that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit" (*id.*, at 4643, Rehnquist, Ch.J., Opn of the Court). That is the substantive effect of this legislation. This Court, nevertheless, objects as to the form selected and prescribed by this State's Legislature and Executive.

In fact, *Board of Education v Wieder* (72 NY2d 174, *supra*) aspirationally urged the provision of services separately to the handicapped students of Kiryas Joel, if Monroe-Woodbury School District could find a way to do so (*id.*, at 189, fn 3). *Wolman* was offered as authority and a guidepost of significant promise for the Legislature in promulgating its ultimate substantive results (*id.*). Ironically,

the Legislature's action is criticized as radical and not sufficiently tailored (Concurring Opn, Kaye, Ch.J., at 1, 11-12).

I conclude that strong and sufficient authority and analysis, past and immediate, support the view that the principal or primary effect of the challenged legislation does not advance religion in this unique context, and that no endorsement of religion may be fairly inferred.

V.

This latest litigation reaches this Court by appeal as of right on constitutional grounds from the affirmance of summary judgment granted to plaintiffs in the Supreme Court declaring Chapter 748 facially unconstitutional. In that procedural framework, of course, disputed inferences or factual issues must be viewed in the light most favorable to defendants and challenges on an as-applied basis should await a future day of reckoning. Undeniably, a sharp Sword of Damocles hangs over the officials charged with implementation of this statute. As Governor Cuomo observed, "[o]f course this new school district must take pains to avoid conduct that violates the separation of church and state * * * * I believe they will be true to their commitment" (Approval Message of the Governor, 1989 NY Legis Ann at 325, *supra*).

The concerns about the degree under which this new school district actually operates within the direction and control of elected community leaders who share a particular religious persuasion are issues of applied fact, not law. A similar fact mix is presented as to whether the creation of such a school is rooted solely in the religious preferences of

the Satmar or in their cultural, essentially secular, needs and rights, which are entitled to an enlightened and permissible societal accommodation. The needs, at least as emphasized by defendants, stem from the additional emotional impacts on Satmarer handicapped students. Defendants note that if these students -- already special -- are compelled to leave the Village and attend special education instruction in the Monroe-Woodbury public schools, they are met with a negative and hostile environment in which their language, customs and appearances are regarded as oddities, at best. Justice Levine sagely observed in dissent at the Appellate Division that deeply troubling concerns persist as to whether the courts are able, even in trial, to delve into, trace and ascertain the "true" Satmar theology and precepts (*Grumet v Bd. of Education of the Kiryas Joel Village School Dist.*, *supra*, 187 AD2d, at 29 [Levine, J., dissenting]; *see also*, Tribe, American Constitutional Law §14-11, at 1231 [2d ed]). The bottom procedural line is that this Court has plainly disfavored summary disposition when faced with similarly sensitive and complicated questions of fact (*see*, *Ware v Valley Stream High School*, 75 NY2d 114, 131).

VI.

Notably, the record in this case documents sharp contrasts between the manner in which the secular special educational services are provided in the Kiryas Joel public school and the distinctive religious lifestyle of the Village. English is the language of instruction within the school; Yiddish is the medium of communication within the Village. In contrast to the method of education at the sectarian schools in the Village, male and female students at the public special education school are grouped together for instructional purposes at the special school; instructional materials are not

based upon the sex of the student being instructed; female employees are not prohibited from exercising authority over male employees; the physical appearance of the building is secular, including the significant absence of mezuzahs on the doorposts; and the dress of the employees is secular in appearance. The democratically-elected Board of Trustees of the Kiryas Joel Village School District has strained to create a nonsectarian educational environment which is faithful to the secular command of the statute. Plainly, this effort is indicative of the secular compromise the Hasidim community was willing to absorb to allow the special education needs of their children to be met within a public, neutral, nondenominational setting.

The judicial nullification of this latest phase of the long-standing tug-of-war prompts the larger question whether control over a public school may ever be placed in the hands of secularly-elected individuals who have a common set of religious beliefs. Does a forbidden "symbolic union" always and automatically emerge? The three Opinions of the Majority suggest so, but I emphatically think not. It is important and fundamental to understand that the establishment of a union free school district geographically identical to an incorporated municipality, in the context of the constitutional and statutory guarantees of public education, neutral religious rights and nondiscrimination provided by both Federal and State law, should not be stigmatized as aid to a particular denomination, simply because the inhabitants of that municipality are predominantly or even exclusively members of that denomination.

For the Court to reject the Legislature's answer with a blunt "No" deprives the citizens of Kiryas Joel of certain educational prerogatives in contravention of their fundamental

right to self-governance. Their free exercise of religion is also inextricably implicated and compromised, simply because they have chosen to live and believe in a particular way together in an incorporated village. This dogmatic "No" at the end of a long, difficult odyssey once against strips the special-needs children of their protected public education rights. In effect, their Free Exercise rights are burdened by draping a drastic, new disability over the shoulders of young pupils solely on account of the religious beliefs of their community (*see*, *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, ____ S Ct ____, 61 USLW 4587 [Scalia, J., concurring], *supra*; *see also*, *McDaniel v Paty*, 435 US 618).

The facile notion that the cultural, psychological and secular differences of the special-needs children of Kiryas Joel cannot be classified as anything but religious in nature should be rejected as alien to our most cherished traditions and values. The cultural disposition and circumstances of handicapped Satmarer children should not disqualify them from government attention on the bare conclusion that their different-ness is derived solely from their religious beliefs and, therefore, is constitutionally inseparable from their religiosity. A culturally diverse Nation, which proclaims itself under a banner, *E Pluribus Unum*, should not tolerate such a self-contradiction, for to penalize and encumber religious uniqueness in this way, in effect, strikes the "E Pluribus" and leaves only the "Unum."

As Justice Levine cogently cautioned in his dissent at the Appellate Division:

> In effect, the majority is saying that the State may not respond to a bona fide *secular interest* of the Satmarer Hasidim, i.e., the

> psychological and emotional vulnerabilities of their handicapped children, because the culture bringing about the insecurities of these youngsters was "molded" by Satmar religious precepts. In a real sense, then, the majority is thus holding that merely because of some link between their religion and a legitimate secular need, the Satmarer are disqualified from receiving from the State the purely secular services to meet that secular need (*Grumet v Board of Education of the Kiryas Joel Village School District*, *supra*, 187 AD2d at 29 [Levine, J., dissenting]).

Courts have no choice but to enter the struggle to examine the evidence and demarcate between a religious practice and the secular cultural consequences of that practice in a pluralistic society after the Legislature has persevered in doing so. If the courts refuse to do so and insist instead on overturning legislation, such as that at issue here, because it is asserted to be nothing more, on its face, than a forbidden accommodation to the exercise of religious "separatism," then frank confrontation with the values and rights under the Free Exercise Clause becomes unavoidable. Without a doubt, the two clauses -- Establishment and Free Exercise -- are in some historical and modern natural tension, and the overlap of the clauses may be said to create a "zone of permissible accommodation" (Tribe, American Constitutional Law §14-7, at 1194 [2d ed]; *see also*, *Ware v Valley Stream High School District*, 75 NY2d 114, *supra*). Justice Souter (with Justices Stevens and O'Connor joining) recently reiterated this principle in the concurring Opinion in *Lee v Weisman* (____ US ____, 112 S Ct 2649):

> That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings. *See*, *e.g.*, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos*, 483 US 327 [1987]; *see also*, *Sherbert v Verner*, 374 US 398 [1963]. Contrary to the views of some, such accommodation does not necessarily signify an official endorsement of religious observance over disbelief (*Lee v Weisman*, *supra*, at 2676-2677).

Chapter 748 of the Laws of 1989 could be viewed as a reasonable accommodation of the Satmarer's free exercise of religion because it alleviates, as a last resort, their lack of choice in either having to forego the substantial benefits of publicly supported special educational services for their handicapped children or having to abandon their religious principles. That accommodation in these circumstances, on a facial attack and analysis, is supportable as a permissible deference to the historical and evolved predominance of Free Exercise protection in First Amendment constitutional adjudication.

I would therefore reverse and not declare Chapter 748 unconstitutional on its face. The judicial nullification of the democratic prerogatives and solution for this intracable Town-wide controversy is not justified. Instead, it seems to spring from a reflexive veneration of a symbolic metaphor that sacrifices concededly-necessary special education

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services of a small group of handicapped pupils. A real wall of separation thus arises and solidifies to a mythic height and density.

* *

Order modified, with costs to plaintiffs, in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Smith. Chief Judge Kaye and Judges Simons and Hancock concur, Chief Judge Kaye and Judge Hancock in separate concurring opinions. Judge Bellacosa dissents and votes to reverse in an opinion in which Judge Titone concurs.

Decided July 6, 1993

APPENDIX B

Supreme Court - Appellate Division
Third Judicial Department

Decided and Entered: December 31, 1992 65398

LOUIS GRUMET, Individually
and as Executive Director
of the New York State School
Boards Association Inc.,
et al.,
Respondents,
v. **OPINION AND ORDER**

BOARD OF EDUCATION OF
THE KIRYAS JOEL VILLAGE
SCHOOL DISTRICT et al.,
Appellants.

Calendar Date: September 15, 1992

Before: Levine, J.P., Mercure, Mahoney, Casey and Harvey, JJ.

Miller, Cassidy, Larroca & Lewin (Lisa Burget and George Shebitz of counsel), Washington, D.C., for Board of Education of the Kiryas Joel Village School District, appellant.

Ingerman, Smith, Greenberg, Gross, Richmond, Heidelberger, Reich & Scricca (Lawrence W. Reich of counsel), Northport, for Board of Education of the Monroe-Woodbury Central School District, appellant.

Jay Worona, New York State School Boards Association, Albany, respondent.

Robert Abrams, Attroney-General (Julie S. Mereson of counsel), Albany, pursuant to Executive Law § 71.

Bernard F. Ashe (Gerard John De Wolf of counsel), Albany, for New York State United Teachers, *amicus curiae*.

Marc D. Stern, New York City, for American Jewish Congress, *amicus curiae*.

Stanley Geller (Lisa Thurau of counsel), New York City, for Committee for Public Education and Religious Liberty, *amicus curiae*.

Casey, J.

Appeal from a judgment of the Supreme Court (Kahn, J.), entered February 10, 1992 in Albany County, which, *inter alia*, granted plaintiffs' motion for summary judgment and declared the Laws of 1989 (ch 748) unconstitutional.

The Laws of 1989 (ch 748) (hereinafter chapter 748) created a new school district, the Kiryas Joel Village School District (hereinafter the Village District), consisting of the territory of the Village of Kiryas Joel (hereinafter the Village), a community of Satmarer Hasidim located wholly within the boundaries of the Monroe-Woodbury Central School District (hereinafter the Monroe-Woodbury District) in Orange County. The statute reflects a political solution to a lengthy dispute between the Monroe-Woodbury District and the residents of the Village, most of whose children attend private religiously affiliated schools within the Village, concerning the provision of special educational services to the Village's handicapped children.

Despite earlier efforts at accommodating the undisputed needs of the Village's handicapped children, resolution of the dispute, which centered on where the services had to be offered, was sought by way of litigation. The Court of Appeals ultimately held that the Monroe-Woodbury District "is neither compelled to make services available to private school handicapped children only in regular public school classes and programs, nor without authority to provide otherwise" (*Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, 72 NY2d 174, 187). The court also rejected the Villagers' claim that the services had to be provided within their private schools or at a neutral site (*id.*, at 187-189). Unfortunately, the dispute was not

resolved, for the Monroe-Woodbury District continued to offer the services at its public schools and the Villagers refused to permit their children to attend the public schools. The creation of the Village District, which could establish its own public school to provide the services within the Village, was viewed as "a good faith effort to solve this unique problem" (Governor's Mem, 1989 McKinney's Session Laws of NY, at 2430).

Plaintiffs, the New York State School Boards Association (hereinafter the Association) and two officers of the Association, commenced this action against several State officials, including the Commissioner of Education and the Comptroller, seeking a judgment declaring chapter 748 unconstitutional. The two school districts moved to intervene as defendants and their motions were granted. Thereafter, the parties stipulated to the discontinuance of the action as to the State officials, although the Attorney-General continued to defend the constitutionality of the statute pursuant to Executive Law § 71. The parties cross-moved for summary judgment and Supreme Court declared the statute unconstitutional, resulting in this appeal.

The preliminary issue to be addressed is the question of standing. Defendants maintain that the Association and its officers, in their capacity as representatives of the Association, do not have standing to maintain this action. We agree. There is nothing in the record to establish that the Association itself is a citizen-taxpayer within the meaning of State Finance Law article 7-A and there is no claim that the Association has sustained any injury in fact. Accordingly, the Association does not have standing in its own right to maintain this action (*see, Matter of Otsego 2000 v Planning Bd. of Town of Otsego*, 171 AD2d 258, 269, *lv*

denied 79 NY2d 753). Nor has it been shown that the Association meets the three requirements for associational or organizational standing (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 775). As units of municipal government, the Association's member school boards do not have the substantive right to raise constitutional challenges to a State statute, particularly in the absence of any claim that compliance with the statute will force one or more of the member school boards to violate a constitutional proscription (*see, Matter of Jeter v Ellenville Cent. School Dist.*, 41 NY2d 283, 287). The only two school districts that might arguably have standing, the Monroe-Woodbury District and the Village District, are parties to this action and the Association clearly does not represent their interests. We conclude, therefore, that the Association and the officers of the Association lack standing to maintain this action. We note that plaintiffs' reliance on *New York State School Bds. Assn. v Sobol* (168 AD2d 188, *aff'd* 79 NY2d 333) is misplaced, for the issue of the Association's standing to maintain that action was neither raised nor decided.

The two individual plaintiffs, Louis Grumet and Albert W. Hawk, are named as party plaintiffs individually, as well as in their capacity as officers of the Association. In their individual capacity, each clearly meets the definition of citizen-taxpayer contained in State Finance Law § 123-a and, therefore, they have statutory standing to maintain an action for declaratory or injunctive relief to prevent the unconstitutional disbursement of State funds (State Finance Law § 123-b [1]). It is undisputed that the Village District created by chapter 748 will receive State funding and, therefore, the constitutionality of that statute can be challenged in a citizen-taxpayer action (*see, Matter of Cario v Sobol*, 157 AD2d 172, 175). The fact that the action was

discontinued as to the State officials when the two school districts intervened as party defendants does not alter this conclusion, for the expenditure of State funds remains an issue and the Attorney-General continues to appear in the action pursuant to Executive Law § 71.

Turning to the merits, we agree with Supreme Court that chapter 748 violates the Establishment Clause of the US Constitution and NY Constitution, article XI, § 3. The tripartite analysis under the Establishment Clause introduced in *Lemon v Kurtzman* (403 US 602, 612), which the United States Supreme Court declined to reconsider in *Lee v Weisman* (___ US ___, ___, 112 SCt 2649, 2655), requires: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion * * * [and third], the statute must not foster 'an excessive governmental entanglement with religion'" (*Lemon v Kurtzman*, *supra*, at 612-613, quoting *Walz v Tax Commn.*, 397 US 664, 668 [citation omitted]).

According to defendants, the statute has the secular purpose of providing special educational services to handicapped children who are not receiving those services. This argument ignores two undisputed facts: the handicapped children of the Village were already entitled to receive those services pursuant to existing Federal and State law (*see*, 20 USC § 1400 *et seq.*; Education Law § 4401 *et seq.*), and those services were actually available to the Village children from the Monroe-Woodbury District, within which the Village was located. The only reason that the children did not receive the services is their parents' refusal to let them attend the public schools of the Monroe-Woodbury District where the services were available. The stated reason for this

refusal is the fear and trauma allegedly sustained by the children upon leaving the language, lifestyle and environment of the Village and mixing with others (*Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, 72 NY2d 174, 188, *supra*). The challenged statute, therefore, was designed not merely to provide special educational services to the handicapped children of the Village, but to provide those services within the Village so that the children would remain subject to the language, lifestyle and environment created by the community of Satmarer Hasidim and avoid mixing with children whose language, lifestyle and environment are not the product of that religion. The dissent finds a secular purpose for the statute in that it would provide the handicapped children of the Village with the publicly supported, secular special educational services they need and to which they are entitled, but as previously noted those services were already available to all of the handicapped children of the Monroe-Woodbury District, including the handicapped children of the Village. Thus, the only secular need for the statute recognized by the dissent did not, in fact, exist.

Assuming that the statute can be viewed as having a secular purpose, the second guideline of the *Lemon* test requires that the principal or primary effect must not advance religion. The Court of Appeals recently explained:

> A particular concern under the "effects" prong is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious

> choices" * * *. Context determines whether particular governmental action is likely to be perceived as an endorsement of religion * * *. Governmental action "endorses" religion if it favors, prefers, or promotes it * * * (*New York State School Bds. Assn. v Sobol*, 79 NY2d 333, 339-340, quoting *School Dist. of City of Grand Rapids v Ball*, 473 US 373, 390 [citations omitted]).

Defendants claim that the creation of a school district to provide educational services should be treated no differently than the creation of a village to provide municipal services, such as police and fire protection. The Supreme Court, however, has recognized that the relationship between government and religion in the education of children is a sensitive one and that government's activities in this area can have a magnified impact, creating "an all-too-ready opportunity for divisive rifts along religious lines in the body politic" (*School Dist. of City of Grand Rapids v Ball*, *supra*, at 383).

Defendants also contend that the provision of educational services to sectarian students and the segregation of those students from others who are not of that sect are incidental benefits which do not offend the Constitution (*see, Mueller v Allen*, 463 US 388, 393; *Wolman v Walter*, 433 US 229, 247-248). Considering the entire context in which the statute was enacted, we conclude that the statute not only authorizes a religious community to dictate where secular public educational services shall be provided to children of the community, it creates the type of symbolic impact that is impermissible under the second prong of the *Lemon* test.

As previously noted, the educational services which the statute was intended to provide were already available to the Village children at public schools within the school district where they resided but outside the boundaries of the Village. If those services were inadequate or inappropriate, as defendants now suggest, existing remedies were available for the parents to pursue (*see*, Education Law § 4404). Instead, the parents claimed that the service had to be provided within the private schools in the Village or at a neutral site within the Village. When this claim proved unsuccessful (*see, Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, *supra*), the parents continued to refuse the services available at the public schools of the Monroe-Woodbury District.

Chapter 748 created a school district coterminous with the Village, which is inhabited by residents who are almost exclusively of one religious sect. The school board is controlled by members of that sect and the children who attend the public school established by the district are all of that sect. The services provided by the school were already available to the children of the Village, but their parents refused to permit them to mix with other students whose language, lifestyle and environment were not the product of the same religious sect. As a result of the statute, the services which were otherwise available at the public schools of the Monroe-Woodbury District are now provided by a public school that is controlled by and located within the religious community, and the children of the community who attend that school are effectively segregated from children of other religions. Regardless of whether the public school operated by the Village District is a neutral site, and regardless of how scrupulous the district is in maintaining the secular nature of the educational services offered at the

school, we are of the view that the symbolic union between church and state effected by the creation of a school district coterminous with a religious enclave to provide within that enclave educational services that were already available elsewhere is significantly likely to be perceived by adherents of the Satmarer Hasidim as an endorsement, and by nonadherents as a disapproval, of their individual religious beliefs (*see*, *School Dist. of City of Grand Rapids v Ball*, *supra*, at 389-392).

We emphasize that it is not the location of the public school in the religious community and the provision of public educational services to sectarian students that we find offensive to the Establishment Clause (*see*, *Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, *supra*, at 189 n 3). The impermissible effect is the symbolic impact of creating a new school district coterminous with a religious community to provide educational services that were already available in an effort to resolve a dispute between the religious community and the school district within which the community was formerly located, a dispute based upon the language, lifestyle and environment of the community's children created by the religious tenets, practices and beliefs of the community.

The dissent asserts that we are foreclosed from considering whether the religious tenets, practices and beliefs of the community played a role in the Village's refusal to accept the special educational services offered by the Monroe-Woodbury District. The record, however, contains uncontradicted evidence of a direct link between the language, lifestyle and environment of the community's children and the religious tenets, practices and beliefs of the community. Based upon similar evidence and in a similar

procedural posture, the Court of Appeals had little difficulty finding such a connection. "With an apparent over-all goal that *children should continue to live by the religious standards of their parents*, 'Satmarer want their school to serve primarily as a bastion against undesirable acculturation, as a training ground for Torah knowledge in the case of boys, and, in the case of girls, as a place to gather knowledge they will need as adult women' * * *" (*Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, *supra* at 180 [emphasis supplied, citation omitted]). The stated reason for the Satmarer parents' refusal of the services offered by the Monroe-Woodbury District was the emotional toll on the Satmarer children allegedly sustained upon "leaving their own community and being with people whose ways were so different from theirs" (*id.*, at 181). Because the "ways" of the Satmarer children were molded by the religious standards of their parents (*id.*, at 180), there can be little doubt that, in fact, religion played a role in the dispute, which we have considered as one of several factors in our decision. Contrary to the dissent's interpretation, our holding, which concerns only the validity of the statute that created a new school district coterminous with a religious community to provide secular services that were already available to the community, has no bearing on whether the Satmarer are somehow "disqualified" from receiving those services. It is noteworthy that although the dissent asserts that we must ignore these undisputed facts, the dissent's "fair and comprehensive analysis by an objective observer" encompasses a search both within and without the record to support the theory that the statute's creation of a school district coterminous with a religious community to provide services to that community which were already available is not relevant in determining whether the particular

governmental action is likely to be perceived as an endorsement of religion.

Finding that the Satmarer's handicapped children have "special psychological vulnerabilities * * * to exposure to the outside world", the dissent is apparently of the view that the special educational services offered by the Monroe-Woodbury District were not "protective" of these "special psychological vulnerabilities". Pursuant to Federal and State Law, handicapped children are entitled to an appropriate special education program and placement, and a parent who finds the placement unacceptable can seek review (*Matter of Northeast Cent. School Dist.* v *Sobol*, 79 NY2d 598, 603). If, as the dissent assumes, the services offered by the Monroe-Woodbury District were inappropriate as not "protective" of the Satmarer children's "special psychological vulnerabilities", the parents had an available administrative remedy to review the proposed placements pursuant to Education Law § 4402 and, if necessary, judicial review of the determination produced by the administrative appeal. This review process could have addressed all of the parents' secular concerns. The dissent's suggestion that the creation of a new school district was the appropriate remedy to address the Satmarer parent's claim that the services offered by the Monroe-Woodbury District were inappropriate for the special needs of their children is less than compelling.

The dissent's alternative argument, that the creation of a new school district might constitute "a valid alleviation of a burden on the Satmarer's religious precepts", is premised on "the majority's assumption that segregated education of their young is an integral part of Satmar religious precepts". We have made no such "assumption". We have merely recognized that uncontradicted evidence in

this record and in the prior litigation establishes a direct link between the Satmarer parents' refusal to accept the services of the Monroe-Woodbury District and the religious tenets, practices and beliefs of the community which have molded the language, lifestyle and environment of the community's children, resulting in an alleged emotional toll when the children leave the community and are with people whose ways are so different from theirs. The Satmarer themselves do not claim that they refused the services of the Monroe-Woodbury District because segregated education of their young is an integral part of Satmarer precepts and we have not made such an assumption. By going beyond the stated position of the Satmarer, the dissent has disregarded its own limitation on the scope of review of the facial validity of chapter 748.

Having concluded that even if chapter 748 has a secular purpose its principal or primary effect advances religion, we see no need to consider the third prong of the *Lemon* test. Although we have concluded that the Association and its officers lacked standing to maintain this action, we see no need to modify Supreme Court's declaratory judgment, which did not grant any specific relief to the Association or its officers. The individual plaintiffs have standing to maintain this action as citizen-taxpayers and Supreme Court granted the appropriate declaratory relief. Its judgment should, therefore, be affirmed.

Mercure, Mahoney and Harvey, JJ., concur.

Levine, J.P. (dissenting).

In my view, it was error for Supreme Court to have granted summary judgment declaring the legislation under

review here (L 1989, ch 748) (hereinafter chapter 748) creating the Kiryas Joel Village School District (hereinafter the Village District), encompassing the territory of the Village of Kiryas Joel (hereinafter the Village) itself, to be facially invalid as a violation of the Establishment Clause of the 1st Amendment to the US Constitution or of article XI, § 3 of the NY Constitution.

I find the distinction, for Establishment Clause purposes, between a law's facial invalidity and invalidity as applied to be far from clear in the case law (*see*, *Bowen v Kendrick*, 487 US 589, 601-602; *id.*, at 627-628 [Blackmun, J., dissenting]). What is clear, however, is that, in deciding that this case was ripe for a determination of the statute's facial invalidity on a motion for summary judgment, Supreme Court and the majority of this court have relied upon extrinsic evidence sharply disputed by the Village District and have ignored evidence submitted by the Village District showing its religiously neutral implementation of the statute, a factor I believe is relevant on the statute's validity both facially and as applied. Moreover, I think the statute is sustainable on a facial challenge even under the majority's factual assumptions, as a limited, permissible accommodation to the values represented by the Free Exercise Clause of the 1st Amendment on behalf of the Satmarer Hassidim inhabiting the Village. I would, therefore, reverse, declare the statute facially valid and remit for trial of the disputed factual issues to determine whether the statute is valid as applied. Clearly, plaintiffs have raised a challenge to the validity of the statute as applied in the second amended complaint and the submissions on their motion for summary judgment. Thus, I would give the Satmarer Hassidim their day in court to establish that the statute can be and has been implemented in a way that sufficiently separates the Village

District's provision of special educational services for their handicapped children from their religious precepts and practices to avoid conflict with the Establishment Clause.

The invalidity of a statute under the Establishment Clause, facially or as applied, is to be determined by whether it contravenes one or more of the three elements of the test announced in *Lemon v Kurtzman* (403 US 602, 612) and recently left standing by the United States Supreme Court in *Lee v Weisman* (____ US ____, ____, 112 SCt 2649, 2655). Under *Lemon*, to avoid violating the Establishment Clause a statute must have a secular legislative purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster excessive governmental entanglement with religion.

Regarding the "purpose" prong of the *Lemon* test, the legislative history of chapter 748 recites that it was enacted to break the impasse between the members of the Satmar Hassidic sect, who comprise the vast majority of the inhabitants of the Village, and the Monroe-Woodbury Central School District (hereinafter the Monroe-Woodbury District), whose territory contained the Village, over the public provision of special educational services for the handicapped children of the Village. As is more fully described in the Court of Appeals' decision in the previous litigation involving this dispute (*see*, *Board of Educ. of Monroe-Woodbury Cent. School Dist v. Wieder*, 72 NY2d 174), the Monroe-Woodbury District had taken the position that special educational services would only be offered at fully integrated public schools located outside the Village, whereas the Satmarer parents insisted that their handicapped children should be provided these services in the Village, either at the parochial schools where all of the nonhandicapped Satmarer

children are educated, or at a neutral site. When the prior litigation failed to resolve the dispute (*see*, *id.*), chapter 748 was enacted for the stated purpose of ensuring that the handicapped children of the Satmarer Hassidim would receive the publicly supported, *secular* special educational services they need and to which they are entitled, at a neutral site in the Village (*see*, Governor's Mem, 1989 Legis Ann, at 324-325).

The foregoing secular purpose is sufficient to comply with the purpose facet of the *Lemon* test, which is only breached if the enactment was "motivated *wholly* by [a religious] purpose" (*Bowen v Kendrick*, 487 US 589, 602, *supra* [emphasis supplied]; *see*, *Wallace v Jaffree*, 472 US 38, 56). Thus, the apprehension expressed in the majority's decision as to some additional, or perhaps ulterior, religion-based motive underlying the enactment of chapter 748 would not serve to render it invalid in this respect. Moreover, in determining the legislative purpose for Establishment Clause analysis, "a court has no license to psychoanalyze the legislators * * *. If a legislature expresses a plausible secular purpose * * * then courts should generally defer to that stated intent * * *" (*Wallace v Jaffree*, *supra*, at 74-75 [O'Connor, J., concurring] [citations omitted]).

The ultimate ground for the majority's invalidation of chapter 748, however, is its conclusion that the primary or principal effect of the legislation is to advance religion. I disagree. It bears emphasis that we are reviewing a determination that chapter 748 is facially invalid, made by Supreme Court in granting plaintiffs' motion for summary judgment. In deciding upon the facial validity of the statute, particularly on cross motions for summary judgment, I believe that this court should not be looking for ulterior

motives for the enactment. Rather, we are bound to look at chapter 748 as a response to the *stated* position of the Satmar sect, expressed not only in sworn affidavits here but consistently throughout the dispute over special educational services for its handicapped children (*see*, *Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, 72 NY2d 174, 180 n 2, 189, *supra*). As repeatedly stated, the motive for the Satmarer parents' refusal to accept the special educational services for their handicapped children offered by the Monroe-Woodbury District was not religious, but was to protect the children from the psychological and emotional trauma caused by exposure to integrated classes outside the Village that were inadequately addressed by the professional staff of the Monroe-Woodbury District.

Thus, on summary judgment the majority seems erroneously to be relying upon a description of Satmar religious precepts on educating the sect's nonhandicapped children contained in the affidavit of Israel Rubin, Ph.D., submitted by plaintiffs, as establishing a religion-based motivation for the refusal of the Satmarer Hassidim to accept the special educational services offered by the Monroe-Woodbury District. Such a sectarian basis for their refusal, however, appears to be directly contradicted by the affidavit of the School Board President of the Village District submitted in the instant case as to the reason why the Monroe-Woodbury District's offer of such services was refused. That affidavit states:

> Monroe-Woodbury has refused to accommodate the distinct language and cultural needs of the handicapped children in [the Village] by providing their education at a neutral site in their locality. * * * Because

> Monroe-Woodbury's restrictions on the educational services for the handicapped children from [the Village] would have a major adverse effect on their educational progress, the handicapped children in [the Village] were not able to receive the special educational services they needed from the public educational system.

The foregoing secular basis for the refusal to accept the services provided by the Monroe-Woodbury District was the same position asserted by the Satmarer Hassidim in the *Board of Educ. of Monroe Woodbury Cent. School Dist v Wieder* (*supra*) litigation. Indeed, the reason why the Court of Appeals in that case refused to entertain a belated claim that providing such special educational services at a neutral site in the Village was mandated under the Free Exercise Clause was that the Satmarer "in their submissions to the trial court insisted that, as a class, they should be exempted from public school placements only for *nonreligious* reasons - most particularly because of the emotional impact on the children of traveling out of Kiryas Joel" (*id.*, at 189 [emphasis in original]). And, in the same decision, after quoting from a treatise describing Satmar religious precepts on the education of children authored by the person whose affidavit the majority relies upon here, the Court of Appeals added in a footnote that the members of the Satmar sect in that case never conceded the accuracy of that description. "Indeed, in their submissions, they make no reference to their religious beliefs or practices, only their life-style and environment" (*id.*, at 180 n 2).

While I am not able to discern with complete confidence why the majority rejects the foregoing religious-

neutral explanation by the Satmarer for their refusal to accept the special educational services of the Monroe-Woodbury District, the majority's rationale seems to be based on either one of two propositions. The first of these is that the Satmarer's explanation is disingenuous, i.e., that segregated education of even its handicapped children is in fact at the core of the Satmar sect's religious beliefs. That proposition, however, is clearly contested by the Village District and, thus, cannot properly form the basis for granting plaintiffs' motion for summary judgment. Beyond that procedural barrier to adopting this proposition, it has grave constitutional implications because it entangles a state civil court in factfinding on what is true Satmar religious doctrine on educating handicapped children (*see*, Tribe, American Constitutional Law § 1411, at 1231 [2d ed]).

Alternatively, the majority's decision may be read as concluding that the Satmarer's professed secular explanation for rejecting the Monroe-Woodbury District's offer of services is, nonetheless, religion based, because the Satmarer's cloistered lifestyle and cultural outlook are derived from their religious beliefs. This, too, has grave constitutional implications under both religion clauses of the 1st Amendment. In effect, the majority is saying that the State may not respond to a bona fide *secular interest* of the Satmarer Hassidim, i.e., the psychological and emotional vulnerabilities of their handicapped children, because the culture bringing about the insecurities of these youngsters was "molded" by Satmar religious precepts. In a real sense, then, the majority is thus holding that merely because of some link between their religion and a legitimate secular need, the Satmarer are disqualified from receiving from the State the purely secular services to meet that secular need. The case law simply does not support such a rigidly

impenetrable wall between church and state as is implicit in this aspect of the majority's decision. Indeed, such a holding conflicts with the United States Supreme Court's decisions that a state does not violate the Establishment Clause by commemorating the secular, *cultural* aspects of the Christmas/Chanukah holiday season, despite its religious origins (*see*, *Allegheny County v Greater Pittsburgh American Civ. Liberties Union*, 492 US 573, 617-620; *Lynch v. Donnelly*, 465 US 668). Thus, in my view, the alleged motivations of the Satmarer Hassidim for refusing fully integrated special educational services outside the Village cannot be the basis for a determination of a facial invalidity of the statute on a summary judgment motion.

Furthermore, in resolving doubts regarding the facial validity of a statute, a court may properly look to how it has been interpreted and applied by the governmental agency charged with enforcing it. (*see*, *Ehlert v United States*, 402 US 99, 105-107; *see also*, *Grayned v City of Rockford*, 408 US 104, 110-111). Therefore, for summary judgment purposes, the sworn submissions of the Village District on the manner in which chapter 748 has been implemented should also be accepted as true. Summarized, the Village District's proof is that the provision of special educational services under chapter 748 takes place at a site distinctly and physically separate from the Village parochial schools and, indeed, from any other place of religious observance. Additionally, the services being provided are distinctly secular as to content, professional staff and physical surroundings.

In the absence of a religious purpose for creation of the Village District as a substitute for the Monroe-Woodbury District, the provision of purely secular special educational

services to the Satmarer handicapped children in an atmosphere that is *not* only *not* "pervasively sectarian", but actually totally devoid of religious influences, appears to be virtually indistinguishable from the provision of therapeutic and remedial services to isolated groups of parochial school students upheld by seven justices of the United State Supreme Court in *Wolman* v. *Walter* (433 US 229, 244-248). In *Wolman*, the Supreme Court specifically rejected the notion that the provision of secular therapeutic and remedial services to school children at a neutral site is suspect, as having the effect of advancing religion, merely because the recipients of the services were separate groups composed exclusively of parochial school students (*id.*).

If not virtually the same as in *Wolman* v *Walter* (*supra*), the fact pattern which we are bound to accept in the present procedural posture of the case is far closer to *Wolman* than it is to *Parents' Assn. of P.S. 16 v Quinones* (803 F2d 1235), the case most heavily relied upon by Supreme Court in granting summary judgment in this case. In *Parents' Assn. of P.S. 16*, the challenged program of remedial instruction for the Satmarer parochial school children at the premises of a New York City public school not only ethnically segregated the children, it virtually replicated the educational practices of the Satmar parochial school by gender segregation for teachers and students, the use of Yiddish as the primary language of instruction and adoption of a reading instruction method employed only in the parochial school (*id.*, at 1237). Additionally, in *Parents' Assn. of P.S. 16*, the court accepted factual assertions regarding Satmar religious precepts on education and relied on factual concessions of public educational authorities that are in dispute here and, thus, should be disregarded on summary judgment in the litigation at hand.

Despite the similarity between the instant case and *Wolman v Walter* (*supra*), as premised on the only facts which this court should properly consider, the majority holds nonetheless that the statutory creation of the Village District has the primary effect of advancing religion because it will be *perceived* as a symbolic state endorsement of Satmar Hassidism. As I read the majority decision, this conclusion is based upon three factors: (1) the creation of a school district coterminous with a "religious enclave", (2) the preexisting availability of special educational services for Satmarer handicapped children provided by the Monroe-Woodbury District outside the Village, and (3) that the true basis for the Satmarer's refusal to accept the integrated special educational services for their handicapped children outside the Village was the conflict which fully integrated schooling would present to their fundamental religious beliefs, or with cultural values inseparable from their religious beliefs.

As to the majority's supposition that the Satmarer's refusal to accept the special education services offered by the Monroe-Woodbury District was religion based, I shall not repeat the reasons for my strong conviction that, on a facial challenge, and particularly on a motion for summary judgment in that context, we are not permitted to go behind the publicly stated and sworn to position of the Satmarer Hassidim of a nonreligious motivation for the refusal.

At first blush, the two other factors relied upon by the majority might well be instinctively perceived as establishing that the State too readily acceded to the Satmarer's "dictates" and, in some sense, thereby symbolically endorsed the sect's religious tenets. However, the question of whether a statute's primary effect is to aid religion by reason of being

perceived as a State endorsement of some religious denomination, or of religion in general, is not to be answered by an uncritical reaction to some superficial or selective presentation of the facts or circumstances concerning the legislation in question. Justice O'Connor, the original proponent of the perception of endorsement approach to adjudging the principal effects of religion-related legislation (*see*, *Lynch v Donnelly*, 465 US 668, 691-692, *supra* [O'Connor, J., concurring]), has stated that "[t]he relevant issue is whether *an objective observer*, acquainted with the text, *legislative history*, and *implementation* of the statute, would perceive [the statute] as a state endorsement" (*Wallace v Jaffree*, 472 US 38, 76 *supra* [O'Connor, J. concurring] [emphasis supplied]).

A fair and comprehensive analysis by an objective observer would have to take into account (1) the professed lack of religious motive of the Satmarer Hassidim for the creation of the Village District previously described, (2) that, uncontrovertably, the Satmarer would have been content had the Monroe-Woodbury District provided educational services at a neutral site in the Village, thus obviating many of the features of the creation of the Village District relied upon by plaintiffs to show symbolic endorsement of religion, (3) that, although the elected Board of Education of the Village District is likely to be entirely composed of Satmarer Hassidim, the Board lacks autonomy in appointing a Superintendent of Schools (*see*, Education Law § 1711 [3]) and the Superintendent is the official controlling the administration of the program (*see*, Education Law § 1711

[5]), [1] and (4) that the implementation of chapter 748 has resulted in the appointment of a highly qualified professional, *not* a member of the Satmar sect, as Superintendent of Schools, who is administering the program with autonomy to provide purely secular special educational services in an atmosphere completely divorced from and in significant respects inconsistent with the precepts of the Satmar sect.

I think that the foregoing facts and circumstances would attenuate, in the eyes of an objective observer, the significance of the creation of a school district coterminous with the Village territory and the availability of special educational services outside the Village as indicia of a State endorsement of Satmar religious precepts. Both factors were merely collateral to the Satmarer's stated objective of obtaining purely secular special educational services for the sect's handicapped children and *their* willingness to accept those services in a truly nonsectarian atmosphere, so long as it was protective of the special psychological vulnerabilities of those children to exposure to the outside world. These are, in my opinion, the only inferences that can fairly be drawn from the evidence contained in the Village District's submissions, and they are insufficient to demonstrate a symbolic link between Church and State, as a matter of law (*see*, *Bowen v Kendrick*, 487 US 589, 613, *supra*).

Even if I were to agree with the majority, however, that the Satmar sect's refusal to accept the Monroe-

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[1] Moreover, the Board of Education's ability to interject religion into the services provided to the children appears to be weak and improbable in light of the dominant supervisory and programatic regulatory role of the State Department of Education over special educational services for handicapped children (*see*, Education Law § 4403; 8 NYCRR part 200).

Woodbury District's integrated special educational services for its handicapped children was based upon fundamental religious beliefs or upon cultural values inseparable from its religious beliefs, I would nonetheless hold that the accommodation of the State to those values and beliefs by the enactment of chapter 748 did not have the primary effect of advancing religion. Rather, the statute survives a facial challenge because its principal effect would then be to lift a substantial burden on the sect's free exercise of religion. The legitimacy of the right of an insular religious sect, under the Free Exercise Clause of the 1st Amendment, to prevent exposure of their children to the worldly influences and inconsistent secular values of the public school system was recognized in *Wisconsin v Yoder* (406 US 205, 218-219). Moreover, a state may constitutionally relieve a substantial governmental burden on a sect's exercise of its religion even when the burden falls short of an actual violation of the Free Exercise Clause (*see*, *Texas Monthly v Bullock*, 489 US 1, 18-19 n 8; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos*, 483 US 327, 334).

Here, the Monroe-Woodbury District had previously provided special educational services for Satmarer handicapped children at an annex to the sect's private parochial school for girls in the Village (*see*, *Board of Educ. of Monroe-Woodbury Cent. School Dist. v Weider*, 72 NY2d 174, 180, *supra*). In 1985, however, the Monroe-Woodbury District resolved that such services would only be offered in integrated classes at public schools outside the Village (*id.*). Thus, under the majority's assumption that segregated education of their young is an integral part of Satmar religious precepts, the Satmarer Hassidim were placed in the dilemma of either having to forego the substantial benefits of publicly supported educational services for their handicapped

children or availing themselves of those benefits at the price of foregoing their religious convictions regarding the manner of educating their children. Unquestionably, a governmental decision that forces a religious observer "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to [obtain the benefits] * * * puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her [religious practice]" (*Sherbert v Verner*, 374 US 398, 404; *see*, *Hobbie v Unemployment Appeals Commn.*, 480 US 136, 140-141).

I am conscious of the danger that an unduly broad application of an accommodation to free exercise values rationale to uphold any governmental benefit to religion could ultimately result in the Free Exercise Clause swallowing up the Establishment Clause (*see*, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos*, *supra*, at 347 [O'Connor, J., concurring]; Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 Yale L J 1127, 1138-1139). It cannot be said at this procedural stage in the action, however, that chapter 748 crosses the line from a valid alleviation of a burden on the Satmarer's religious precepts in separately educating their handicapped children to an invalid advancement of religion by promoting the Satmar sect's ability to inculcate its religious values in educating those children. First, undoubtedly, the loss of remedial and rehabilitative educational services for Satmarer handicapped children is a discernible, substantial burden (*see*, *Lee v Weisman*, ___ US ___, ___, 112 SCt 2649, 2677-2678 [Souter, J., concurring], *supra*). Second, the accommodation to Satmar religious educational practices is minimal, as compared to the practices in their parochial schools in the

Village and to the accommodations described in *Parents' Assn. of P.S. 16 v Quinones* (803 F2d 1235, *supra*). The court in *Parents' Assn. of P.S. 16* took pains to suggest that a constitutionally valid, minimal accommodation to Satmar religious beliefs could have been devised in providing remedial services to the sect's parochial school students by emphasizing that "in the circumstances of the present case, it is difficult to believe that the City cannot devise alternatives for making its remedial services available to the Beth Rachel students in a way that neither requires them to disregard their religious beliefs nor appears to endorse those beliefs" (*id.*, at 1242). Third, the Satmarer Hassidim had attempted to obtain an acceptable accommodation to their religious beliefs in a less symbolically promotional manner by countersuing in *Board of Educ. of Monroe-Woodbury Cent. School Dist v Weider* (*supra*) to compel the existing public school system to provide special educational services to their handicapped children at a neutral site in the Village. When that attempt was unsuccessfull (*see*, *id.*) the statutory creation of the Village District became the only viable remaining means to accommodate Satmar practices regarding the separate education of the sect's children, a factor weighing in favor of the validity of the legislation (*see*, Tribe, American Constitutional Law § 14-15, at 1285-1286 [2d ed]). Fourth, the statute gives the Satmarer Hassidim no greater advantage in exercising their religious educational practices than they enjoyed prior to the Monroe-Woodbury District's decision to withdraw its special educational services from a site in the Village, an additional factor favoring validity (*see*, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos*, supra, at 337).

Where, as here, the challenged statute promotes Free Exercise values by alleviating a substantial government-

imposed burden on a religious observance, the symbolism of a governmental endorsement is entitled to relatively little weight in determining whether the statute's primary effect is to advance religion. As Justice O'Connor observed in *Wallace v Jaffree* (472 US 38, 83):

> It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute -- that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief -- courts should assume that the 'objective observer,' * * * is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.

It follows from the foregoing that the statute facially passes the effects prong of the *Lemon* test, whether or not one agrees with the majority view that the statute represents an accommodation to the Satmarer's religious beliefs and practices.

Turning then to the remaining prongs of the *Lemon* Establishment Clause test, i.e., whether the creation of the Village District leads to an excessive government entanglement with religion, I find that for purposes of a facial challenge a violation of that standard has also not been demonstrated. In aid to education cases under the Establishment Clause, the risk of excessive entanglement has been found to arise in three forms of potential, mutual church-state intrusiveness: (1) the need for intense surveillance of a publicly supported secular educational program conducted under the auspices of religious authorities, to insure the absence of any religious indoctrination, (2) dual and overlapping administration of the religious and secular parts of the educational program, necessitating a close, continuing relationship between secular and religious educational and administrative staff, and (3) political divisiveness, for example, from budgetary competition between secular and religious programs (*see*, *Lemon v Kurtzman*, 403 US 602, 623, *supra*; *Aguilar v Felton*, 473 US 402, 413-414). As pointed out in *Bowen v Kendrick* (487 US 589, *supra*), however, typically a finding of excessive entanglement in educational aid cases has "rested * * * on the *undisputed fact* that the elementary and secondary schools receiving aid were 'pervasively sectarian' and had 'as a substantial purpose the inculcation of religious values'" (*id.*, at 616, quoting *Aguilar v Felton*, *supra*, at 411, quoting *Committee for Public Educ. & Religious Liberty v Nyquist*, 413 US 756, 768 [emphasis supplied]). The existence of a pervasively sectarian institutional setting for the Village District's programs, having a substantial purpose of religious indoctrination, certainly is not an "undisputed fact" here. Any monitoring of the program that occurs here would be exclusively of secular, not sectarian, professional staff. Furthermore, without the presence of religious

educators or administrators participating in any of the programs conducted on premises by the Village District, the possibility of entanglements from necessary secular/sectarian working relationships is speculative and remote. Such factors have been held sufficient to sustain the validity of aid to education legislation under the excessive entanglement prong of the Lemon test (*see*, *Bowen v Kendrick*, *supra*, at 616-617; *Wolman v Walter*, 433 US 229, 248, *supra*; *Roemer v Board of Pub. Works of Maryland*, 426 US 736, 762). The potential for political divisiveness as a result of the creation of the Village District also seems remote. The Satmarer handicapped children are entitled to publicly financed special educational services according to their needs irrespective of where they are provided or who provides them. The threat of political divisiveness is belied by the fact that the Monroe-Woodbury District, the political subdivision most directly affected financially by the carving out of the Village District, has consistently supported the position of the Village District in the instant action.

Based upon all the foregoing reasons, I have concluded that chapter 748 is not facially invalid under the Establishment Clause of the 1st Amendment. I would also hold it valid facially under article XI, § 3 of the NY Constitution, inasmuch as there is utterly nothing in the language of the statute or its legislative history establishing that the Village District is controlled by the Satmar sect. Accordingly, I would reverse Supreme Court's judgment, grant defendants partial summary judgment declaring chapter 748 facially valid, and remit to Supreme Court for trial on the outstanding issues of fact necessary to resolve the validity of the statute as applied.

ORDERED that the judgment is affirmed, without costs.

ENTER:

Michael J. Novack
Clerk

APPENDIX C

STATE OF NEW YORK COUNTY OF ALBANY

SUPREME COURT

LOUIS GRUMET, Individually and as Executive Director of the New York State School Boards Association, Inc.; ALBERT W. HAWK, Individually and as President of the New York State School Boards Association, Inc., and the NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC.,

Plaintiffs,

-against-

NEW YORK STATE EDUCATION DEPARTMENT; THOMAS SOBOL, as Commissioner of the New York State Education Department; NEW YORK STATE BOARD OF REGENTS; EDWARD V. REGAN, as New York State Comptroller; EMANUEL AXELROD, as District Superintendent of Orange-Ulster BOCES; BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT; BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,

Defendants.

Supreme Court - Request for Judicial Intervention

March 7, 1990-August 14, 1991 - RJI 0190 021649 Index No. 1054-90

JUSTICE LAWRENCE E. KAHN, Presiding

APPEARANCES: New York State School Boards Association Legal Department
Attorney for plaintiffs
Jay Worona, Esq. (General Counsel)
Cynthia Plumb Fletcher, Esq. (of Counsel)
Pilar Sokol, Esq.
119 Washington Avenue
Albany, New York 12210
465-3474

Miller, Cassidy, Larroca & Lewin
Attorneys for KIRYAS JOEL VILLAGE SCHOOL DIST.
David G. Webbert, Esq. (of Counsel)
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Parisi, DeLorenzo, Gordon, Pasquariello & Weiskopf, P.C.
Eric A. Tepper, Esq. (of Counsel) (Local Counsel)
Attorneys for KIRYAS JOEL VILLAGE SCHOOL DIST.
210 Nott Terrace
Schenectady, New York 12307
374-8494

APPEARANCES: (continued)

Hon. Robert Abrams, Attorney General
Attorney for NEW YORK STATE
Mary Ellen Clerkin, Esq.
(of Counsel)
The Capitol
Albany, New York 12224
473-6288

Ingerman, Smith, Greenberg, Gross,
Richmond, Heidelberger
& Reich, Esqs.
Attorneys for MONROE-WOODBURY
Lawrence W. Reich, Esq.
(of Counsel)
167 Main Street
Northport, New York 11768
(516) 261-8834

New York State United Teachers
Amicus Curiae
Gerard John DeWolf, Senior
Counsel
159 Wolf Road
Box 15-008
Albany, New York 12212-5008
459-5400

KAHN, J.

This litigation challenges the constitutionality of Chapter 748 of the Laws of 1989, which created the Kiryas Joel Village School District. While presenting issues which are new and distinct, it continues years of litigation, which in one form or another, all emanate from attempts to obtain public funding for special education programs for children of the Satmar Hasidic Sect. Much of the history of the relationship between the present litigants has been documented by the Court of Appeals in *Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder*, (72 NY2d 174). Therein, the issue to be determined was whether special services to the handicapped children of the Village of Kiryas Joel were statutorily required to be provided in the public schools or in religiously affiliated private schools. Ultimately, the court determined that the applicable provisions of the Education Law did not require the Board of Education of the Monroe-Woodbury Central School District to offer such services only in regular public school classes. The court also rejected the contention that such services must be provided to non-public school children on the premises of the schools they normally attend. In its previous decision, the Court of Appeals set forth relevant background information, stating that:

> "Kiryas Joel is a community of Hasidic Jews. Apart from separation from the outside community, separation of the sexes is observed within the Village. Yiddish is the principle language of Kiryas Joel; television, radio and English language publications are not in general use. The dress and appearance of the Hasidim are distinctive--the boys, for

example, wear long side curls, head coverings and special garments, and both males and females follow a prescribed dress code. Education is also different: Satmar children generally do not attend public schools, but attend their own religiously affiliated schools within Kiryas Joel." (p. 179 and 180).

In an acknowledged attempt to compromise the ongoing dispute, the challenged statute created a school district whose boundaries are literally contiguous with the incorporated Village of Kiryas Joel, and provided for the election of trustees with the powers and duties of trustees of a union free school district. A Board of Education was thereafter elected and the school properties within the boundaries of the new district were transferred off the rolls of the Monroe-Woodbury School District, effective July 1, 1990. The only "public" school within the new District provides educational services for handicapped children.

The instant declaratory judgment action was commenced on or about January 19, 1990 and challenges the creation of the school district on constitutional grounds, asserting that it violates the principles of separation of church and state. Plaintiffs also assert that the legislation violates equal protection guarantees. Originally, the New York State Department of Education and other state officials, including the Comptroller, were named as defendants. Motions to intervene were made by the Board of Education of the Monroe-Woodbury School District and the Board of Education of Kiryas Joel Village School District. Those motions were granted by the court and a second amended complaint was served. By so-ordered stipulation, the action was discontinued against the State defendants with the recognition that the Attorney General would continue to

appear in support of the constitutionality of the statute (Executive Law, section 1). Presently, plaintiffs have moved for summary judgment seeking a declaration that Chapter 748 is unconstitutional. The Attorney General and the party-defendants have all cross-moved for summary judgment seeking a declaration of constitutionality.

The legislation which has generated the present controversy is straightforward. It provides that:

> "The territory of the Village of Kiryas Joel in the Town of Monroe, Orange County, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel Village School District and shall have and enjoy all of the powers and duties of a union free school district under the provisions of the Education Law."

Section (2) of the legislation provides for the newly created District to be under the control of a Board of Education composed of between five and nine members elected by the qualified voters of the Village of Kiryas Joel. Finally, the bill provides that the terms of members of the school board shall not exceed five years. Plaintiffs assert that this act violates the Establishment Clause of the First Amendment to the United States Constitution and its New York State counterpart (Article XI, section 3).

Plaintiffs, individually, have standing to maintain this litigation. It is without doubt that encouraging individual citizen taxpayers "to take an active, aggressive interest in his state . . . [is] the classical means for effective scrutiny of legislative and executive action." (*Boryszewski v Brydges*, 37

NY2d 361, 364). "[A] citizen or taxpayer has the right to challenge in the courts, as unconstitutional, acts of government . . . ." (*Wein v Carey*, 41 NY2d 498, 500-501). Further, with respect to the New York State School Boards Association, said Association has very recently litigated similar questions, as a party plaintiff, without any question by either the other litigants or the judiciary concerning its standing to maintain the action. (*New York State School Boards Ass'n v Sobol*, N.Y.A.D. 3 Dept. 570 N.Y.S. 29, 716). Accordingly, the Appellate Division was satisfied that said Association had standing to litigate the issues before it. In this regard, the Appellate Division has determined that the issue of standing must be decided as a threshold issue before deciding constitutional challenges. (See: *County of Rensselaer v Regan*, A.D. 3 Dept., December 31, 1991).

Turning to the merits, the Court of Appeals has recognized that "[w]hile the principle of separation of Church and State is deep-rooted, . . . [t]here is no litmus test for determining which services may be rendered by a public body to parochial school students and which may not . . . ." (*Board of Educ. v Wieder*, supra, p 189, footnote 3). In illustrating that principle, the court cited *Wolman v Walter*, (433 US 229), indicating that the decision had "so many categories and splintered votes that it can only read with a scorecard." (Ibid).

The leading and most-oft cited case upon the issues of separation of Church and State is *Lemon v Kurtzman*, (403 US 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745). Therein, the Supreme Court wrote that "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." (p 164). The Court determined that

legislation, such as that challenged herein does not violate the Establishment Clause if it has a secular purpose, has the principal or primary effect of neither advancing nor inhibiting religion, and does not foster an excessive entanglement with religion. Legislation which gives the appearance of providing a significant symbolic benefit to religion "by reason of the power conferred" (*Larkin v Grendal's Den*, S.Ct. 505, 511, 74 L.Ed 2d 297), will not pass constitutional muster.

In applying the three-pronged test of *Lemon*, (supra), it becomes evident that the challenged statute violates all three. First, it has a sectarian rather than a secular purpose. There is no doubt that the legislation was an attempt by the Executive and Legislature to accommodate the sectarian wishes of the citizens of Kiryas Joel by taking the extraordinary measure of creating a governmental unit to meet their parochial needs.

The statute rather than serving a legitimate governmental end, was enacted to meet exclusive religious needs and has the effect of advancing, protecting and fostering the religious beliefs of the inhabitants of the school district.

The residents of the Village of Kiryas Joel have unequivocably refused and rejected any attempts to provide for the education of handicapped pupils from the Village at a neutral site previously offered by the Monroe-Woodbury School District. The present site can hardly be described as neutral. Rather, it lies squarely within the borders of a religious community, whose articulated goal is to remain segregated from the rest of society. Labeling the Village as a "union free public school district" cannot alter reality.

The Village of Kiryas Joel and the coterminous school district is an enclave of segregated individuals who share common religious beliefs which shape the social, political and familial mores of their lives from cradle to grave. "We want to be separate. It's intentional." (*Parents Association of P.S. 16, et al v Quinones*, 803 F.2d 1235, 1238). In fact, this school district was created solely and exclusively to meet religious needs. Such a law clearly violates the establishment of religion clause of both the State and Federal Constitution. The establishment of a governmental unit, in this case, a school district, constitutes a most direct affront to the establishment clause. The legislation is an attempt to camouflage, with secular garments, a religious community as a public school district.

Said legislation also fosters excessive entanglements with religion. As the Commissioner of Education, Thomas Sobol, states in his affidavit, the Kiryas Joel Village School District is a dependent school district within the Orange-Ulster supervisory district and is a component district of the Orange-Ulster Board of Cooperative Educational Services. His affidavit also makes it clear that Boards of Education of dependent school districts may not appoint their own superintendents without express recommendation of the Executive Officer of the Supervisory District. Further, the Commissioner's affidavit outlines the extent to which the State Education Department must take special steps to monitor the newly created school district to ensure that public funds are not expended to further religious purposes. He concludes that his staff "in its monitoring capacity is unavoidably entangled in matters of religion." (Sobol affidavit, par. 12).

The intent of the Legislature and Executive to be responsive to the citizens of Kiryas Joel is laudatory and

reflects the political process straining to meet the parochial needs of a religious group. However, their action violates the First Amendment which prohibits legislation which promotes the establishment of religion. The Satmar Hasidic sect enjoys religious freedom as guaranteed by the very First Amendment that they are now seeking to circumvent. This short range accomplishment could in the long run, jeopardize the very religious freedom that they now enjoy.

The strength of our democracy is that a multitude of religious, ethnic and racial groups can live side by side with respect for each other. The uniqueness of religious values, as observed by the Satmar Sect, is especially to be admired as non-conformity becomes increasingly more difficult to sustain, however, laws cannot be enacted to advance and endorse such parochial needs in violation of our deep-rooted principle of separation of Church and State.

For the reasons hereinabove set forth, plaintiffs' motion for summary judgment shall be granted. The cross-motion by the Attorney General and the party-defendants for summary judgment, seeking a declaration of constitutionality shall be denied. Plaintiff shall be directed to submit an order and judgment which declares that Chapter 748 of the Laws of 1989 violates the Establishment Clause of the First Amendment to the United States Constitution and its New York State counterpart, Article XI, section (3). All papers are being returned to counsel for plaintiff, who shall submit an order in conformance herewith, with a copy of this decision annexed.

DATED: January 22, 1992

Albany, New York